

THIS BOOK CONTAINS THE OFFICIAL
REPORTS OF CASES

DECIDED BETWEEN

DECEMBER 13, 2002 and MAY 22, 2003

IN THE

Supreme Court of Nebraska

VOLUME CCLXV

PEGGY POLACEK

OFFICIAL REPORTER

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BY PEGGY POLACEK, REPORTER OF THE SUPREME COURT
AND THE COURT OF APPEALS

For the benefit of the State of Nebraska

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SUPREME COURT
DURING THE PERIOD OF THESE REPORTS

JOHN V. HENDRY, Chief Justice
JOHN F. WRIGHT, Associate Justice
WILLIAM M. CONNOLLY, Associate Justice
JOHN M. GERRARD, Associate Justice
KENNETH C. STEPHAN, Associate Justice
MICHAEL M. MCCORMACK, Associate Justice
LINDSEY MILLER-LERMAN, Associate Justice

COURT OF APPEALS
DURING THE PERIOD OF THESE REPORTS

JOHN F. IRWIN, Chief Judge
EDWARD E. HANNON, Associate Judge
RICHARD D. SIEVERS, Associate Judge
EVERETT O. INBODY, Associate Judge
THEODORE L. CARLSON, Associate Judge
FRANKIE J. MOORE, Associate Judge

PEGGY POLACEK Reporter
LANET ASMUSSEN Clerk
JOSEPH C. STEELE State Court Administrator

JUDICIAL DISTRICTS AND DISTRICT JUDGES

Number of District	Counties in District	Judges in District	City
First	Fillmore, Gage, Jefferson, Johnson, Nemaha, Pawnee, Richardson, Saline, and Thayer	Orville L. Coady Paul W. Korslund Daniel Bryan, Jr.	Hebron Beatrice Auburn
Second	Cass, Otoe, and Sarpy	Ronald E. Reagan George A. Thompson Randall L. Rehmeier William B. Zastera	Papillion Papillion Nebraska City Papillion
Third	Lancaster	Bernard J. McGinn Jeffre Cheuvront Earl J. Withoff Paul D. Merritt, Jr. Karen Flowers Steven D. Burns John A. Colborn	Lincoln Lincoln Lincoln Lincoln Lincoln Lincoln Lincoln
Fourth	Douglas	Robert V. Burkhard J. Patrick Mullen John D. Hartigan, Jr. Joseph S. Troia Richard J. Spethman Gerald E. Moran Gary B. Randall Patricia A. Lamberty J. Michael Coffey Sandra L. Dougherty W. Mark Ashford Peter C. Bataillon Gregory M. Schatz J. Russell Derr James T. Gleason Thomas A. Otepka	Omaha Omaha Omaha Omaha Omaha Omaha Omaha Omaha Omaha Omaha Omaha Omaha Omaha Omaha

JUDICIAL DISTRICTS AND DISTRICT JUDGES

Number of District	Counties in District	Judges in District	City
Fifth	Boone, Butler, Colfax, Hamilton, Merrick, Nance, Platte, Polk, Saunders, Seward, and York	Robert R. Steinke Alan G. Gless Michael Owens Mary C. Gilbride	Columbus Seward Aurora Wahoo
Sixth	Burt, Cedar, Dakota, Dixon, Dodge, Thurston, and Washington	Darvid D. Quist Maurice Redmond F.A. Gossett III	Blair Dakota City Fremont
Seventh	Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne	Robert B. Ensz Patrick G. Rogers	Wayne Norfolk
Eighth	Blaine, Boyd, Brown, Cherry, Custer, Garfield, Greeley, Holt, Howard, Keya Paha, Loup, Rock, Sherman, Valley, and Wheeler	William B. Cassel Ronald D. Oberding	Ainsworth Burwell
Ninth	Buffalo and Hall	John P. Icenogle James Livingston Teresa K. Luther	Kearney Grand Island Grand Island
Tenth	Adams, Clay, Franklin, Harlan, Kearney, Nuckolls, Phelps, and Webster	Stephen Illingsworth Terri Harder	Hastings Minden
Eleventh	Arthur, Chase, Dawson, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Hooker, Keith, Lincoln, Logan, McPherson, Perkins, Red Willow, and Thomas	John J. Battershell John P. Murphy Donald E. Rowlands II James E. Doyle IV	McCook North Platte North Platte Lexington
Twelfth	Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Grant, Kimball, Morrill, Scotts Bluff, Sheridan, and Sioux	Paul D. Empson Robert O. Hippe Brian Silverman Randall L. Lippstreu Kristine R. Cécava	Chadron Gering Alliance Gering Sidney

JUDICIAL DISTRICTS AND COUNTY JUDGES

Number of District	Counties in District	Judges in District	City
First	Gage, Jefferson, Johnson, Nemaha, Pawnee, Richardson, Saline, and Thayer	Curtis L. Maschman J. Patrick McArdle Steven Bruce Timm	Falls City Wilber Beatrice
Second	Cass, Otoe, and Sarpy	Larry F. Fugit Robert C. Wester John F. Steinheider Todd Hutton	Papillion Papillion Nebraska City Papillion
Third	Lancaster	James L. Foster Gale Pokorny Jack B. Lindner Mary L. Doyle Laurie J. Yardley Jean A. Lovell	Lincoln Lincoln Lincoln Lincoln Lincoln Lincoln
Fourth	Douglas	Samuel V. Cooper Jane H. Prochaska Stephen M. Swartz Lyn V. White Thomas G. McQuade Edna R. Atkins Lawrence Barrett Joseph P. Caniglia Marcena M. Hendrix Darryl R. Lowe John E. Huber Jeffrey Marcuzzo	Omaha Omaha Omaha Omaha Omaha Omaha Omaha Omaha Omaha Omaha
Fifth	Boone, Butler, Colfax, Dodge, Hamilton, Merrick, Nance, Platte, Polk, Saunders, Seward, and York	Curtis H. Evans Gerald E. Rouse Frank J. Skorupa Gary F. Hatfield Patrick R. McDermott Marvin V. Miller	York Columbus Columbus Central City David City Wahoo

JUDICIAL DISTRICTS AND COUNTY JUDGES

Number of District	Counties in District	Judges in District	City
Sixth	Burt, Cedar, Dakota, Dixon, Dodge, Thurston, and Washington	Daniel J. Beckwith Paul R. Robinson C. Matthew Samuelson Kurt Rager	Fremont Hartington Blair Dakota City
Seventh	Antelope, Cumming, Knox, Madison, Pierce, Stanton, and Wayne	Philip R. Riley Richard W. Krepela Donna F. Taylor	Creighton Madison Madison
Eighth	Blaine, Boyd, Brown, Cherry, Custer, Garfield, Greeley, Holt, Howard, Keya Paha, Loup, Rock, Sherman, Valley, and Wheeler	August F. Schuman Alan L. Brodbeck Gary G. Washburn	Ainsworth O'Neill Burwell
Ninth	Buffalo and Hall	David A. Bush Philip M. Martin, Jr. Gerald R. Jorgensen Graten D. Beavers	Grand Island Grand Island Kearney Kearney
Tenth	Adams, Clay, Fillmore, Franklin, Harlan, Kearney, Nuckolls, Phelps, and Webster	Jack Robert Ott Robert A. Ide Michael Offner	Hastings Holdrege Hastings
Eleventh	Arthur, Chase, Dawson, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Hooker, Keith, Lincoln, Logan, McPherson, Perkins, Red Willow, and Thomas	Kent E. Florom Cloyd Clark B. Bert Leffler Kent D. Turnbull Carlton E. Clark	North Platte McCook Benkelman North Platte Lexington
Twelfth	Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Grant, Kimball, Morrill, Scotts Bluff, Sheridan, and Sioux	Charles Plantz James T. Hansen James L. Macken G. Glenn Camerer Thomas H. Dorwart C.G. Wallace	Rushville Chadron Gering Gering Sidney Kimball

SEPARATE JUVENILE COURTS AND JUVENILE COURT JUDGES

County	Judges	City
Douglas	Douglas F. Johnson	Omaha
	Elizabeth G. Crnkovich	Omaha
	Wadie Thomas, Jr.	Omaha
	Christopher Kelly	Omaha
	Vernon Daniels	Omaha
Lancaster	Toni G. Thorson	Lincoln
	Thomas B. Dawson	Lincoln
	Linda S. Porter	Lincoln
Sarpy	Lawrence D. Gendler	Papillion
	Robert O'Neal	Papillion

WORKERS' COMPENSATION COURT AND JUDGES

Judges	City
Michael P. Cavel	Omaha
James R. Coe	Omaha
Laureen K. Van Norman	Lincoln
Ronald L. Brown	Lincoln
James M. Fitzgerald	Lincoln
Michael K. High	Lincoln
John R. Hoffert	Lincoln

ATTORNEYS
Admitted Since the Publication of Volume 264

JILL MARIE ABRAHAMSON
BRIAN JAMES ALSETH
JENNIFER L. BLISS
NICHOLE S. BOGEN
DAVID BRUGGEMAN
DANIEL E. BRYAN III
COREY ALLEN BURNS
STEVEN J. CHRISTOPHERSEN
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MATTHEW R. DEAVER
RUSSELL SCOTT DUERKSEN
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RUTH ADELINE FEIERABEND
BRIAN EDWARD FLANNERY
GRANT ALAN FORSBERG
BRANDIE FOWLER
JEFFREY P. GALYEN
EMILY GLASGOW
KEELY GOLDBERG
JEANA GOOSMANN
MIKILIN GREENWOOD
JANET JENSON GUSTAFSON
TERRY LEE HADDOCK
STEVEN WILLIAM HOLLAND
ROSEMARIE R. HORVATH
ROBERT SCHAAF HUME
MERCEDES S. IVERER
NORMAN D. JAMES
MICHAEL R. JOHNSON

RICHARD LEE JOHNSON
ROBERT L. KEITH
RENAE KELDERMAN
BRENT KELLY KEMPEMA
EDWARD EARL KEY
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RICHARD DEAN VROMAN

CHRISTOPHER GEORGE WADDLE
Y. EVETTE LOPER WATT
HORACIO JOSE WHEELOCK
JOHN WIECHMANN

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LIST OF CASES DISPOSED OF
BY FILED MEMORANDUM OPINION

No. S-00-967: **Rydberg v. I.H.S. Inc.** Reversed and remanded with directions. Stephan, J.

No. S-01-897: **Gallner v. Gallner**. Affirmed. Miller-Lerman, J.

No. S-01-1269: **Dawes Cty. Bd. of Equal. v. Suchor**. Affirmed. Miller-Lerman, J.

No. S-01-1367: **State v. Caddy**. Sentence vacated, and cause remanded for resentencing. Stephan, J.

No. S-02-076: **State v. Beltran**. Affirmed. Per Curiam.

No. S-02-331: **Weeder v. Courtney**. Reversed and remanded for further proceedings. Miller-Lerman, J.

No. S-02-373: **Presle v. Presle**. Reversed and remanded for further proceedings. Per Curiam.

No. S-02-379: **Judd v. Olmeda**. Reversed and remanded for further proceedings. Gerrard, J.

No. S-02-477: **Fundco, Inc. v. Spatz**. Affirmed. Stephan, J.

No. S-02-605: **Chojolan v. Armour Food Co.** Reversed and remanded with directions. Hendry, C.J.

LIST OF CASES DISPOSED OF
WITHOUT OPINION

No. S-01-440: **State v. West**. Judgment of Court of Appeals affirmed.

No. S-01-489: **State ex rel. Counsel for Dis. v. Thompson**. Respondent is reinstated to the practice of law, subject to the conditions of reinstatement set forth in the court's judgment entered November 1, 2002.

No. S-01-1150: **Teal v. Dickhaut**. Stipulation allowed; appeal dismissed; each party to pay own costs.

No. S-01-1395: **Miller v. Burlington Northern RR. Co.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. S-02-226: **Gateway Construction v. Walter**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. S-02-261: **In re Proposed Amend. to Title 291**. Motion considered; appeal dismissed.

No. S-02-527: **Phelps Co. v. Olson**. Stipulation allowed; appeal dismissed.

No. S-02-554: **State v. Hess**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-02-604: **Bell v. Ridgetop Holding Co.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-02-663: **State v. Maly**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. S-02-666: **State v. Miner**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-02-721: **State v. Simants**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-02-831: **State v. McCain**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-02-1040: **State v. Holt**. Motion of appellee for summary dismissal sustained; appeal dismissed.

No. S-02-1202: **State v. Johnson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-02-1286: **State v. Leon**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-02-1320: **State v. Marks**. Upon consideration of appellee's suggestion of remand, to which appellant has filed no response, the cause is remanded to the district court for Douglas County for resentencing on appellant's conviction of the offense of use of a firearm to commit a felony, in order to allow proper credit for time served, including time spent in custody pending resolution of the direct appeal. See, *State v. Marks*, 248 Neb. 592, 537 N.W.2d 339 (1995); Neb. Rev. Stat. § 83-1,106(1) (Reissue 1999).

No. S-02-1336: **State ex rel. Counsel for Dis. v. Wintroub**. Edward L. Wintroub suspended from the practice of law in the State of Nebraska effective immediately until further order of this court.

No. S-02-1375: **State v. El-Tabech**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2). Issues procedurally barred.

No. S-03-152: **Morrison Enters. v. Aetna Cas. & Surety Co.** The July 22, 2002, order was a final, appealable order. No timely motion or appeal having been taken from that order, all subsequent orders by the district court are without jurisdiction. Appellant's motion to vacate the February 18, 2003, order is sustained, and the district court is directed to reinstate the July 22, 2002, order. Appellee's motion for summary dismissal is overruled. By order of the court, appeal dismissed. See rule 7A(2).

No. S-03-284: **State v. Carter**. Appeal dismissed. See rule 7A(2).

No. S-03-323: **State ex rel. Counsel for Dis. v. Rasmussen**. Judgment of suspension.

LIST OF CASES ON PETITION
FOR FURTHER REVIEW

No. A-00-1164: **Kieselhorst v. Schneiderheinz**. Petition of appellant for further review overruled on December 18, 2002.

No. A-00-1314: **Albers v. Atlas Roofing Corp.** Petition of appellant for further review overruled on January 3, 2003.

No. A-01-068: **Anderson Excav. & Wrecking Co. v. Argus Dev. Co.** Petition of appellant for further review overruled on April 9, 2003.

No. A-01-114: **State on behalf of Hannon v. Rosenberg**, 11 Neb. App. 518 (2002). Petition of appellee for further review overruled on January 30, 2003.

No. A-01-254: **Shilling v. Shanks**. Petition of appellant for further review overruled on December 18, 2002.

No. A-01-290: **Neff v. Wenzl**. Petition of appellant for further review overruled on December 18, 2002.

No. A-01-296: **Hyde v. Hyde**. Petition of appellee for further review overruled on December 11, 2002.

No. A-01-327: **Arias v. Krutz**. Petition of appellant for further review overruled on March 19, 2003.

No. A-01-390: **Harvey Oaks Homeowner's Assn. v. Aslan Company**. Petition of appellant for further review overruled on March 12, 2003.

No. A-01-507: **Deal v. State**. Petition of appellee for further review overruled on April 23, 2003.

No. A-01-513: **McGuire v. McGuire**, 11 Neb. App. 433 (2002). Petition of appellant for further review overruled on January 23, 2003.

No. A-01-613: **Harvey Oaks Dental v. Peter Letterese & Assocs.** Petition of appellee for further review overruled on March 12, 2003.

No. A-01-694: **American Bus. Info. v. Burgess**. Petition of appellee for further review overruled on March 19, 2003.

No. A-01-708: **Kisicki v. Mid-America Fin. Inv. Corp.** Petition of appellee for further review overruled on January 23, 2003.

No. A-01-765: **C. Goodrich, Inc. v. Thies**. Petition of appellee for further review overruled on April 9, 2003.

No. A-01-771: **Washington Cty. Bd. of Equal. v. Rushmore Borglum**, 11 Neb. App. 377 (2002). Petition of respondent for further review overruled on April 9, 2003.

No. A-01-802: **In re Trust Created by Charles E. Fleecs**. Petition of appellee for further review overruled on February 12, 2003.

No. A-01-868: **Rowland v. Rowland**. Petition of appellant for further review overruled on March 12, 2003.

No. A-01-928: **State v. Sullivan**. Petition of appellant for further review overruled on February 26, 2003.

No. A-01-1017: **Security First Bank v. Lockwood**. Petition of appellee for further review overruled on February 26, 2003.

No. S-01-1055: **Big Crow v. City of Rushville**, 11 Neb. App. 498 (2002). Petition of appellee for further review sustained on February 12, 2003.

No. S-01-1101: **Bennett v. Labenz**. Petition of appellee City of Omaha for further review sustained on January 15, 2003.

No. A-01-1106: **Van Valkenburg v. Liberty Lodge No. 300**. Petition of appellant for further review overruled on February 26, 2003.

No. A-01-1126: **State v. Griess**, 11 Neb. App. 389 (2002). Petition of appellee for further review overruled on January 23, 2003.

No. A-01-1155: **Ditter v. Nebraska Bd. of Parole**, 11 Neb. App. 473 (2002). Petition of appellant for further review overruled on March 12, 2003.

No. A-01-1156: **Svoboda v. Ledford**. Petition of appellant for further review overruled on January 23, 2003.

No. A-01-1173: **In re Interest of Rodgers F. et al.** Petition of appellant for further review overruled on December 18, 2002.

No. S-01-1194: **Morris v. Nebraska Health System**. Petition of appellant for further review sustained on January 15, 2003.

No. A-01-1198: **Penton v. Penton**. Petition of appellant for further review overruled on March 12, 2003.

No. A-01-1233: **Cook v. Cook**. Petition of appellant for further review overruled on January 3, 2003.

No. A-01-1261: **Wunderlich v. Miller**. Petition of appellee for further review overruled on December 11, 2002.

No. A-01-1264: **State v. Lococo**. Petition of appellant for further review overruled on February 20, 2003.

No. A-01-1268: **State v. Arias**. Petition of appellant for further review overruled on February 28, 2003.

No. A-01-1283: **State v. Miller**, 11 Neb. App. 404 (2002). Petition of appellant for further review overruled on January 15, 2003.

No. A-01-1309: **Bralick v. Grimm**. Petition of appellee for further review overruled on January 15, 2003.

No. A-01-1344: **State v. Hernandez**. Petition of appellant for further review overruled on March 26, 2003.

No. A-01-1345: **State v. Shock**, 11 Neb. App. 451 (2002). Petition of appellee for further review overruled on January 29, 2003.

No. A-01-1387: **State v. Hall**. Petition of appellant for further review overruled on January 15, 2003.

No. A-02-036: **Cole v. Truell**. Petition of appellant for further review overruled on April 23, 2003.

No. A-02-071: **State v. Chairez**. Petition of appellant for further review overruled on April 23, 2003.

No. A-02-075: **State v. Conrad**. Petition of appellant for further review overruled on April 23, 2003.

No. A-02-088: **In re Guardianship & Conservatorship of Hartwig**, 11 Neb. App. 526 (2003). Petition of appellee for further review overruled on March 12, 2003.

No. A-02-106: **In re Interest of Jeffrey G.** Petition of appellant for further review overruled on January 29, 2003.

No. A-02-150: **Goertzen v. Goertzen**. Petition of appellant for further review overruled on March 19, 2003.

No. S-02-176: **State v. Ways**. Petition of appellant for further review sustained on April 9, 2003.

No. A-02-225: **VanDeWalle v. VanDeWalle**. Petition of appellant for further review overruled on December 18, 2002.

No. A-02-235: **State v. Castillo**, 11 Neb. App. 622 (2003). Petition of appellant for further review overruled on April 30, 2003.

No. A-02-259: **State v. Eckman**. Petition of appellant for further review overruled on January 3, 2003.

No. A-02-282: **State v. Davis**. Petition of appellant for further review overruled on December 11, 2002.

No. A-02-289: **State v. George**. Petition of appellant for further review overruled on March 12, 2003.

No. A-02-317: **Cole v. Foster**. Petition of appellant for further review overruled on February 20, 2003.

No. A-02-345: **State v. Carpenter**. Petition of appellant for further review overruled on March 12, 2003.

No. S-02-379: **Judd v. Olmeda**. Petition of appellant for further review sustained on February 12, 2003.

No. A-02-450: **State v. Thompson**. Petition of appellant for further review overruled on April 9, 2003.

No. A-02-508: **State v. Spencer**. Petition of appellant for further review overruled on March 19, 2003.

No. A-02-519: **State v. Gunter**. Petition of appellant for further review overruled on March 12, 2003.

No. A-02-570: **State v. Buggs**. Petition of appellant for further review overruled on January 15, 2003.

No. A-02-588: **State v. Neemann**. Petition of appellant for further review overruled on December 11, 2002.

No. A-02-600: **State v. Jackett**. Petition of appellant for further review overruled on March 12, 2003.

No. A-02-608: **Mihm v. American Tool**, 11 Neb. App. 543 (2003). Petition of appellant for further review overruled on March 12, 2003.

No. A-02-624: **In re Interest of Dylan M.** Petition of appellant for further review overruled on April 16, 2003.

No. A-02-626: **State v. Tinnell**. Petition of appellant for further review overruled on December 18, 2002.

No. A-02-628: **State v. Theodoropoulos**. Petition of appellant for further review overruled on January 29, 2003.

No. A-02-677: **State v. Vargas-Godinez**. Petition of appellant for further review overruled on February 12, 2003.

No. A-02-699: **State v. Christlieb**. Petition of appellant for further review overruled on January 23, 2003.

No. A-02-719: **State v. Jacobson**. Petition of appellant for further review overruled on April 16, 2003.

No. A-02-720: **State v. Ellis**. Petition of appellant for further review overruled on January 3, 2003.

No. A-02-734: **State v. Wessling**. Petition of appellant for further review overruled on February 12, 2003.

No. A-02-744: **State v. Polston**. Petition of appellant for further review overruled on March 12, 2003.

No. A-02-745: **State v. Core**. Petition of appellant for further review overruled on February 12, 2003.

No. A-02-763: **In re Interest of Sarah K. et al.** Petition of appellant for further review overruled on January 23, 2003.

No. A-02-776: **State v. Brody**. Petition of appellant for further review overruled on February 26, 2003.

No. A-02-784: **State v. Zuck**. Petition of appellant for further review overruled on March 12, 2003.

No. A-02-788: **In re Interest of Chico B. & Cheri B.** Petition of appellant for further review overruled on April 30, 2003.

No. A-02-805: **State v. Stewart**. Petition of appellant for further review overruled on February 20, 2003.

No. A-02-825: **State v. Thille**. Petition of appellant for further review overruled on March 12, 2003.

No. A-02-838: **State v. Jenkins**. Petition of appellant for further review overruled on February 20, 2003.

No. A-02-856: **Prokop v. Columbus Irrigation**. Petition of appellant for further review overruled on January 3, 2003.

No. A-02-910: **State v. Overstreet**. Petition of appellant for further review overruled on March 19, 2003.

No. A-02-915: **State v. Whitmer**. Petition of appellant for further review overruled on January 29, 2003.

No. S-02-967: **Mumin v. Dees**. Petition of appellant for further review sustained on March 12, 2003.

Nos. A-02-990 through A-02-992: **State v. Miner**. Petitions of appellant for further review overruled on March 19, 2003.

No. A-02-1009: **Martin v. Board of Parole**. Petition of appellant for further review overruled on January 15, 2003.

No. A-02-1025: **State v. Williams**. Petition of appellant for further review overruled on March 26, 2003.

No. A-02-1078: **Martin v. Lindner**. Petition of appellant for further review overruled on January 23, 2003.

No. A-02-1082: **State v. Van Meveren**. Petition of appellant for further review overruled on March 26, 2003.

No. A-02-1095: **State v. Threats**. Petition of appellant for further review overruled on March 12, 2003.

No. A-02-1132: **State v. Weddingfeld**. Petition of appellant for further review overruled on April 23, 2003.

No. A-02-1136: **Nebraska Furniture Mart v. Duffy**. Petition of appellant for further review overruled on January 29, 2003.

No. A-02-1191: **State v. Ramos**. Petition of appellant for further review overruled on February 26, 2003.

No. A-02-1231: **Patz v. Department of Corr. Servs.** Petition of appellant for further review overruled on April 9, 2003.

No. A-02-1232: **Jones v. Department of Corr. Servs.** Petition of appellant for further review overruled on April 23, 2003.

No. A-02-1288: **Anzalone v. Department of Corr. Servs.** Petition of appellant for further review overruled on February 12, 2003.

No. A-02-1344: **State v. Roundtree**. Petition of appellant for further review overruled on April 23, 2003.

No. A-02-1354: **Nelson v. Weiler**. Petition of appellant for further review overruled on February 20, 2003.

No. A-02-1355: **Kirkpatrick v. Wiler**. Petition of appellant for further review overruled on February 20, 2003.

No. A-02-1402: **State v. Sorensen**. Petition of appellant for further review overruled on April 23, 2003.

No. A-03-070: **State v. Lang**. Petition of appellant for further review overruled on April 9, 2003.

No. A-03-082: **Holder v. Kenny**. Petition of appellant for further review overruled on May 6, 2003.

No. A-03-097: **Robinson v. Board of Parole**. Petition of appellant for further review overruled on April 16, 2003.

CASES DETERMINED
IN THE
SUPREME COURT OF NEBRASKA

TIMOTHY S. EGAN, APPELLANT, V.
ALAN G. STOLER, APPELLEE.
653 N.W.2d 855

Filed December 13, 2002. No. S-01-461.

1. **Summary Judgment: Appeal and Error.** On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists.
2. ____: _____. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Statutes: Judgments: Appeal and Error.** Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
4. **Malpractice: Words and Phrases.** Any professional misconduct or any unreasonable lack of skill or fidelity in the performance of professional or fiduciary duties is malpractice.
5. **Limitations of Actions: Malpractice: Torts: Contracts.** If a plaintiff's claims are for professional malpractice, whether pled in tort or contract, the statute of limitations for professional negligence contained in Neb. Rev. Stat. § 25-222 (Reissue 1995) applies.
6. **Limitations of Actions.** The period of limitations begins to run upon the violation of a legal right, that is, when the aggrieved party has the right to institute and maintain suit.
7. **Malpractice: Limitations of Actions.** The discovery exception of Neb. Rev. Stat. § 25-222 (Reissue 1995) applies only in those cases in which the plaintiff did not discover and could not reasonably have discovered the existence of the cause of action within the applicable statute of limitations.
8. ____: _____. The 2-year statute of limitations contained in Neb. Rev. Stat. § 25-222 (Reissue 1995) is applicable notwithstanding the fact that the plaintiff may not discover the cause of action until shortly before the expiration of the time period.
9. **Judgments: Appeal and Error.** Where the record adequately demonstrates that the decision of a trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court, an appellate court will affirm.

10. **Malpractice: Limitations of Actions.** If an action is not to be considered time barred, a plaintiff must file within 2 years of the alleged act or omission or show that the action falls within the exceptions of Neb. Rev. Stat. § 25-222 (Reissue 1995) as to the discovery of a defendant's alleged negligence.
11. **Limitations of Actions: Pleadings.** If a petition alleges a cause of action ostensibly barred by the statute of limitations, such petition, in order to state a cause of action, must show some excuse tolling the operation and bar of the statute.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Affirmed.

Thomas M. Locher and Robyn R. Loveland, of Locher, Cellilli, Pavelka & Dostal, L.L.C., for appellant.

William R. Johnson and Raymond E. Walden, of Lamson, Dugan & Murray, L.L.P., for appellee.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MCCORMACK, J.

NATURE OF CASE

Timothy S. Egan appeals from an order sustaining a motion for summary judgment in favor of appellee, Alan G. Stoler. The district court found Egan's claims barred by the statute of limitations for professional negligence. We conclude that Egan has abandoned all of his claims except whether a statute of limitations for professional negligence applies to the claim of a conflict of interest and, if so, whether the statute of limitations ran barring Egan from bringing a professional negligence cause of action against Stoler. We conclude that Egan's claim is time barred by the 2-year professional negligence statute of limitations, but our analysis differs from the district court's analysis. Accordingly, we affirm the district court's order.

BACKGROUND

In May 1992, Egan, a licensed attorney, was convicted in federal court on criminal conspiracy to distribute methamphetamine. In September 1992, Egan was sentenced to 188 months in federal prison. After trial, Egan dismissed his trial counsel and retained Stoler to appeal his conviction.

On November 23, 1992, Egan and Stoler met for the first time at the Federal Medical Center in Rochester, Minnesota, where Egan was confined. Initially and throughout their conversations, Egan alleges he indicated to Stoler his desire to pursue a claim of ineffective assistance of trial counsel. Egan claims specifically to have asked Stoler if he was aware of any rumors that his trial counsel had abused drugs or alcohol during his representation of Egan. Egan claims that Stoler denied having such knowledge. At the same time, however, Stoler was representing a client who testified before a grand jury investigating Egan's trial counsel's involvement in drug-related crimes. Egan alleges that Stoler did not advise Egan of his potential conflict of interest at this time.

In June 1993, Stoler filed Egan's direct appeal in the Eighth Circuit Court of Appeals. The appeal did not raise the issue of ineffective assistance of trial counsel. Both Stoler and Egan agreed to this strategy. On September 13, Stoler argued the appeal in front of the Eighth Circuit. On February 28, 1994, the Eighth Circuit affirmed Egan's conviction.

In the following months, Egan discussed with Stoler the possibility of filing for a rehearing en banc to the Eighth Circuit Court of Appeals and the possibility of filing a writ of certiorari to the U.S. Supreme Court. Neither strategy was employed. In May 1994, Stoler's formal representation of Egan ended. Egan paid Stoler \$37,000 for his services.

In September 1994, Egan was disbarred as a result of his conviction. See *State ex rel. NSBA v. Egan*, 246 Neb. 583, 520 N.W.2d 779 (1994). While at the Federal Medical Center, Egan learned of the criminal investigation of his trial counsel by the office of the U.S. Attorney, the same office that had prosecuted Egan. Based on this newly discovered evidence, Egan asked Stoler to represent him again on a motion for new trial. Stoler considered the relevant case law for approximately a month. On October 5, 1994, Stoler informed Egan of his potential conflict of interest in that he had represented a client who testified at Egan's trial counsel's grand jury criminal investigation in September 1992.

On October 2, 1995, Egan sued Stoler in state district court on three counts: (1) negligence, (2) fraudulent misrepresentation, and (3) breach of contract. Specifically, Egan alleged that Stoler

failed to raise all relevant issues in Egan's direct appeal before the Eighth Circuit. Furthermore, Egan alleged that Stoler failed to disclose the existence of a conflict of interest throughout his representation of Egan, which directly affected Stoler's ability to independently and zealously represent Egan. Egan alleged that he would have been unable to discover the conflict of interest even in the exercise of reasonable diligence. In addition, Egan alleges that Stoler misrepresented his knowledge of Egan's trial counsel's alleged chemical dependency. Egan alleges that he relied upon Stoler's false representations to his detriment. Egan's petition seeks return of the \$37,000 fee paid to Stoler.

The district court granted summary judgment in favor of Stoler on the basis that the 2-year statute of limitations under Neb. Rev. Stat. § 25-222 (Reissue 1995) for professional negligence had expired. The district court reasoned that the basis of Egan's damages was the alleged failure of Stoler to raise all relevant issues on Egan's direct appeal. Specifically, the court held that Egan knew or should have known, on or before July 1, 1993, of Stoler's alleged failure to raise an ineffective assistance of counsel claim at the time his appellate brief had been presented for review. Egan filed his lawsuit against Stoler on October 2, 1995, more than 2 years after he knew or should have known of the alleged acts giving rise to his claim. The district court granted summary judgment based upon its determination that the discovery exception of § 25-222 allowing suit within 1 year of discovery of the cause of action was not applicable. Egan appeals.

ASSIGNMENT OF ERROR

Egan assigns that the district court erred by ruling that the 2-year statute of limitations, at § 25-222 and applicable to professional negligence, barred him from seeking reimbursement for attorney fees paid to Stoler. Egan contends that the conduct of Stoler in agreeing to represent him while knowingly operating under a conflict of interest does not give rise to the application of any statute of limitations. Egan claims that therefore, the district court erred in applying the aforementioned statute of limitations and in not requiring that the aforementioned fees be disgorged. Egan claims the district court should have determined that there is no time limitation for the disgorgement of

fees paid to any attorney who knew of or should have known of a conflict of interest.

STANDARD OF REVIEW

[1] On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists. *Mondelli v. Kendel Homes Corp.*, 262 Neb. 263, 631 N.W.2d 846 (2001); *Morrison Enters. v. Aetna Cas. & Surety Co.*, 260 Neb. 634, 619 N.W.2d 432 (2000); *Sack Bros. v. Tri-Valley Co-op*, 260 Neb. 312, 616 N.W.2d 786 (2000).

[2] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Richmond v. Case*, 264 Neb. 319, 647 N.W.2d 90 (2002); *Smeal v. Olson*, 263 Neb. 900, 644 N.W.2d 550 (2002); *Polinski v. Sky Harbor Air Serv.*, 263 Neb. 406, 640 N.W.2d 391 (2002).

[3] Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *In re Application No. C-1889*, 264 Neb. 167, 647 N.W.2d 45 (2002).

ANALYSIS

In his reply brief, Egan states that “the issue before this Court is only one: whether a statute of limitations applies to the claim of conflicts of interest and, if so, whether the statute of limitations ran disabling [Egan] from bringing a professional negligence cause of action against Stoler.” Reply brief for appellant at 1. We take this statement by Egan at face value and conclude that Egan has abandoned all of his claims save “whether a statute of limitations applies to the claim of conflicts of interest and, if so, whether the statute of limitations ran disabling [Egan] from bringing a professional negligence cause of action against Stoler.”

The statute of limitations for professional negligence in § 25-222 provides in relevant part:

Any action to recover damages based on alleged professional negligence or upon alleged breach of warranty in rendering or failure to render professional services shall be commenced within two years next after the alleged act or

omission in rendering or failure to render professional services providing the basis for such action; *Provided*, if the cause of action is not discovered and could not be reasonably discovered within such two-year period, then the action may be commenced within one year from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier

[4,5] This court has determined that any professional misconduct or any unreasonable lack of skill or fidelity in the performance of professional or fiduciary duties is malpractice. *Olsen v. Richards*, 232 Neb. 298, 440 N.W.2d 463 (1989). If a plaintiff's claims are for professional malpractice, whether pled in tort or contract, the statute of limitations for professional negligence contained in § 25-222 applies. *Reinke Mfg. Co. v. Hayes*, 256 Neb. 442, 590 N.W.2d 380 (1999). Therefore, we view Egan's appeal before this court as a single cause of professional malpractice limited by the 2-year statute of limitations for professional negligence.

[6-8] The period of limitations begins to run upon the violation of a legal right, that is, when the aggrieved party has the right to institute and maintain suit. *Witherspoon v. Sides Constr. Co.*, 219 Neb. 117, 362 N.W.2d 35 (1985). The 1-year discovery exception of § 25-222 is a tolling provision. However, the discovery exception applies only in those cases in which the plaintiff did not discover and could not reasonably have discovered the existence of the cause of action within the applicable statute of limitations. *Berntsen v. Coopers & Lybrand*, 249 Neb. 904, 546 N.W.2d 310 (1996). In compliance with the plain meaning of the statute, we have determined that the 2-year statute of limitations is applicable notwithstanding the fact that the plaintiff may not discover the cause of action until shortly before the expiration of the time period. *Ames v. Hehner*, 231 Neb. 152, 435 N.W.2d 869 (1989).

In this case, the district court found that it was apparent from the face of Egan's petition that the action was barred by the 2-year professional negligence statute of limitations. The court reasoned that Egan's direct appeal submitted to the Eighth Circuit constituted Egan's basis of relief. The court concluded

that Egan knew his direct appeal did not raise the issue of ineffective assistance of counsel as of July 1, 1993. The court dismissed Egan's petition filed on October 2, 1995, because it was barred by the 2-year statute of limitations. The court determined that no exception applied.

[9] Although we agree with the district court's conclusion, our analysis of the facts and time periods differ. We conclude that Egan's cause of action accrued when Egan retained Stoler on November 23, 1992. At this time, Stoler had a duty to disclose any conflict of interest. See Canon 5, DR 5-105(A) through (C), of the Code of Professional Responsibility. If he did not disclose, he breached his fiduciary duty. On October 5, 1994, Stoler informed Egan that he could not represent him in his postconviction motion because of a possible conflict of interest. As of October 5, Egan was on notice of Stoler's failure to disclose. Since Egan discovered the facts upon which he bases his cause of action within the 2-year time limitation, the discovery rule is inapplicable. Since no other exception applied, Egan's action was time barred as of November 23, 1994, 2 years after Stoler's breach occurred. Where the record adequately demonstrates that the decision of a trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court, an appellate court will affirm. *State v. Parmar*, 263 Neb. 213, 639 N.W.2d 105 (2002).

[10,11] If an action is not to be considered time barred, a plaintiff must file suit within 2 years of the alleged act or omission or show that the action falls within the exceptions of § 25-222 as to the discovery of a defendant's alleged negligence. *Lindsay Mfg. Co. v. Universal Surety Co.*, 246 Neb. 495, 519 N.W.2d 530 (1994). Likewise, if a petition alleges a cause of action ostensibly barred by the statute of limitations, such petition, in order to state a cause of action, must show some excuse tolling the operation and bar of the statute. *Teater v. State*, 252 Neb. 20, 559 N.W.2d 758 (1997); *Zion Wheel Baptist Church v. Herzog*, 249 Neb. 352, 543 N.W.2d 445 (1996). We conclude that Egan's claim, as defined by Egan in his reply brief, alleges a cause of action barred by the statute of limitations and does not set forth an excuse which would toll the operation of the statute.

CONCLUSION

We conclude that Egan's claim is barred by the 2-year professional negligence statute of limitations and that no exception applies. Although our application of the statute of limitations differs from the district court's analysis, we affirm the district court's order sustaining a motion for summary judgment in favor of Stoler.

AFFIRMED.

HENDRY, C.J., not participating.

CRETE EDUCATION ASSOCIATION, AN UNINCORPORATED
ASSOCIATION, APPELLEE, v. SALINE COUNTY SCHOOL
DISTRICT No. 76-0002, ALSO KNOWN AS
CRETE PUBLIC SCHOOLS, A POLITICAL SUBDIVISION
OF THE STATE OF NEBRASKA, APPELLANT.
654 N.W.2d 166

Filed December 13, 2002. No. S-01-617.

1. **Commission of Industrial Relations: Appeal and Error.** Any order or decision of the Commission of Industrial Relations may be modified, reversed, or set aside by an appellate court on one or more of the following grounds and no other: if the commission acts without or in excess of its powers, if the order was procured by fraud or is contrary to law, if the facts found by the commission do not support the order, and if the order is not supported by a preponderance of the competent evidence on the record considered as a whole.
2. **Commission of Industrial Relations: Supreme Court: Evidence: Appeal and Error.** In an appeal from a Commission of Industrial Relations order regarding prohibited practices stated in Neb. Rev. Stat. § 48-824 (Reissue 1998), the Nebraska Supreme Court will affirm a factual finding of the commission if, considering the whole record, a trier of fact could reasonably conclude that the finding is supported by a preponderance of the competent evidence.
3. ____: ____: ____: _____. The Nebraska Supreme Court will consider the fact that the Commission of Industrial Relations, sitting as the trier of fact, saw and heard the witnesses and observed their demeanor while testifying and will give weight to the commission's judgment as to credibility.
4. **Trial: Evidence: Appeal and Error.** An improper exclusion of evidence is ordinarily not prejudicial where substantially similar evidence is admitted without objection.
5. **Labor and Labor Relations: Federal Acts: Statutes.** Decisions under the National Labor Relations Act are helpful in interpreting the Nebraska Industrial Relations Act, but are not binding.

Cite as 265 Neb. 8

6. **Labor and Labor Relations: Employer and Employee.** Direct dealing occurs when an employer undercuts the authority of a collective bargaining agreement by negotiating directly with an individual employee regarding a mandatory subject of bargaining.
7. **Labor and Labor Relations: Federal Acts.** Wages, hours, and other terms and conditions of employment or any question arising thereunder are considered to be mandatory subjects of bargaining under the Nebraska Industrial Relations Act.
8. **Labor and Labor Relations: Waiver: Words and Phrases.** In the context of the Nebraska Industrial Relations Act, waiver is defined as a voluntary and intentional relinquishment or abandonment of a known existing legal right or such conduct as warrants an inference of the relinquishment of such right.
9. **Waiver: Estoppel.** In order to establish a waiver of a legal right, there must be clear, unequivocal, and decisive action of a party showing such a purpose, or acts amounting to estoppel on his or her part.
10. **Commission of Industrial Relations: Administrative Law: Equity.** The Commission of Industrial Relations does not have authority to grant declaratory or equitable relief.
11. **Commission of Industrial Relations: Administrative Law: Statutes: Jurisdiction.** The Commission of Industrial Relations is an administrative body performing a legislative function. Thus, it has only those powers delineated by statute, and should exercise that jurisdiction in as narrow a manner as may be necessary.
12. **Declaratory Judgments.** The function of a declaratory judgment is to determine justiciable controversies which either are not yet ripe for adjudication by conventional forms of remedy or, for other reasons, are not conveniently amenable to the usual remedies.
13. **Injunction.** Injunctive relief is generally preventative, prohibitory, or protective.
14. **Commission of Industrial Relations.** Neb. Rev. Stat. § 48-825(2) (Reissue 1998) authorizes the Commission of Industrial Relations, upon a finding that a party has committed a prohibited practice, to order an appropriate remedy.
15. **Commission of Industrial Relations: Administrative Law: Federal Acts.** Cease and desist orders are nothing more than the Commission of Industrial Relations' ordering a party to cease and desist violating provisions of the Nebraska Industrial Relations Act.

Appeal from the Nebraska Commission of Industrial Relations.
Affirmed in part, and in part reversed.

Kelley Baker and Karen A. Haase, of Harding, Shultz & Downs, for appellant.

Mark D. McGuire, of McGuire and Norby, for appellee.

Robert A. Bligh for amicus curiae Nebraska Association of School Boards.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, McCORMACK, and MILLER-LERMAN, JJ.

HENDRY, C.J.

I. INTRODUCTION

The Crete Education Association (CEA) filed a complaint against Saline County School District No. 76-0002, also known as Crete Public Schools (District), with the Commission of Industrial Relations (CIR). The CEA alleged that the District engaged in prohibited labor practices under Neb. Rev. Stat. § 48-824(2) (a), (e), and (f) (Reissue 1998). The CIR found for the CEA. The District appeals. Both the District and the CEA filed petitions to bypass the Nebraska Court of Appeals, which this court granted.

II. FACTUAL BACKGROUND

On March 9, 2000, the CEA requested negotiations with the District regarding the terms and conditions of teacher employment for the upcoming 2000-2001 school year. The District agreed to negotiate, and negotiations began on April 19, 2000. At no time during the negotiation sessions was impasse reached or declared.

Near the time that negotiations were requested, a position for an industrial technology teacher at Crete High School became available. The District was concerned about its ability to fill this position with a qualified applicant and, accordingly, expanded its advertising for the position. Five or six applications for the position were received, but only three were deemed suitable to interview. Interviews for the three applicants were scheduled for April 3, 2000, but only two applicants were actually interviewed. The position was offered to Matthew Hintz on April 4.

Prior to offering the position to Hintz, Kim Sheppard, principal of Crete High School, discussed the results of the interview process with Dr. John Fero, superintendent of the District. Sheppard expressed concern over whether Hintz would accept the offer, given the \$21,000 yearly salary. Due to Sheppard's concern, Dr. Fero authorized Sheppard to offer Hintz a starting salary of \$24,000, an amount which Dr. Fero testified he felt would be within the range of the base salary after the negotiations between the District and the CEA were completed for the 2000-2001 school year.

At the District's school board meeting held April 10, 2000, the District approved the hiring of Hintz. While the minutes of

that board meeting do not reflect the \$24,000 starting salary, there was testimony that the board did discuss the amount of the starting salary at that meeting. The meeting was attended by Chad Denker, past president of the CEA, as well as Jana Fulton, president of the CEA during the relevant negotiations. The record reflects that at this meeting, the board “opened up the floor” for general public comment, but none was made. When Hintz signed his contract on April 27, the salary amount was left blank pending the upcoming negotiations.

Negotiations between the CEA and the District commenced on April 19, 2000, with a goal to formulate a collective bargaining agreement for the 2000-2001 school year. Each side was represented by a negotiating team. Representing the District were Dr. Fero, then school board president Dr. Gary Lothrop, and chief negotiator Gary Williams, who was also a school board member. Representing the CEA were Denker, Fulton, Jennene Puchalla, and chief negotiator Mike Coe.

At this first meeting, one of the issues raised by the CEA was the salary to be paid some of the new teachers. In addressing this issue, Dr. Fero noted that Hintz had been promised \$24,000, but had signed a blank contract.

The next three negotiation sessions took place between May 3 and June 14, 2000. The District made five different offers during these sessions, with an effective base salary ranging from \$23,661 to \$24,826. The CEA’s proposals made during these negotiations included base salaries of \$21,900 to \$22,200.

A fifth and final negotiation meeting was held on August 8, 2000. At this meeting, the District presented its sixth proposal which included, in effect, a base salary of \$23,716. The CEA countered with their sixth proposal, which included a base salary of \$21,700. At this juncture, the District questioned why the CEA did not favor an increase in the base salary. According to the minutes of that session:

Mike Coe explained CEA wanted to keep the current index. There is not a board policy that he is aware of that prohibits them [the District] from giving a bonus, because it would not affect the salary index.

The entire CEA Negotiations team does not agree with giving a non-experienced teacher any extra steps.

The District then presented its seventh proposal, which included a base salary of \$21,650. In response to Fulton's concern about the low base salary for the upcoming year, the minutes reflect that the District's business manager "stated that the CEA told them to give a bonus." The minutes further reflect that "Mike Coe explained again that there is no board policy which prevents the board from giving a bonus, but that the Negotiation Team did not endorse or approve of it."

The District's seventh proposal was approved by the membership of the CEA. This agreement contained, inter alia, a base salary of \$21,650, but made no mention of signing bonuses. On August 30, 2000, however, the District and Hintz entered into a separate agreement to make up the difference between the \$24,000 promised contract price and the \$21,650 base price through the payment of a bonus.

The CEA learned of this separate agreement, and on November 16, 2000, filed suit in the CIR pursuant to the Nebraska Industrial Relations Act (NIRA), Neb. Rev. Stat. §§ 48-801 to 48-842 (Reissue 1998). The CEA alleged that the District had engaged in prohibited labor practices in violation of § 48-824(2)(a), (e), and (f) by refusing to bargain with respect to the "'signing bonuses,'" by "dealing directly" with Hintz, and by unilaterally repudiating the salary schedule in the parties' negotiated agreement.

A hearing was held before the CIR on February 1, 2001. District superintendent Dr. Fero's testimony reflected that the District had made six proposals prior to the proposal which the CEA accepted and that all six proposals included a base salary at or near \$24,000. Dr. Fero further testified that the District felt it was necessary to raise the base salary in order to attract new teachers and remain competitive with other districts. He then testified that after the District had expressed concern over the low base salary, the CEA responded by informing them that there was nothing in law or policy to prevent the District from paying a bonus, but that the CEA did not endorse or approve of it. Dr. Fero testified that he took these statements to mean that the CEA was "saying it's okay to pay bonuses" and further, that the District had changed its negotiating position in reliance on the CEA's apparent willingness to allow the payment of signing bonuses. He stated that the District would not have agreed to a

base salary of \$21,650 without a “clear agreement” that it could pay a signing bonus to Hintz.

Dr. Lothrop, president of the District’s school board during the time of the relevant negotiations, testified that the impetus for the school board’s change in position regarding the desire for a \$24,000 base was the fact that the beginning of the school year was fast approaching and that the District wanted a new agreement before the new school year began. He testified that “settling [this agreement] before school I don’t think anybody would disagree in this room is in the best interest of the teachers, the board, the administration and the students.” He similarly testified that he felt the CEA had agreed to the use of a bonus as a solution to the District’s low base salary problem.

Coe, chief negotiator for the CEA, testified that the minutes were accurate in recording his statement that “there is no board policy which prevents the board from giving a bonus.” However, he explained that he felt the minutes did not adequately express his emphasis that the CEA did not endorse or approve the idea of paying a bonus. He testified that he felt he had been clear in communicating that the CEA was not endorsing or approving the use of bonuses.

Fulton, on behalf of the CEA, testified that at the first negotiation meeting on April 19, 2000, Denker raised the issue of paying Hintz \$24,000, but that Hintz’ name did not come up in the discussions after that time. Fulton further testified recalling discussions on paying bonuses, but contended that those discussions occurred only in the last session and not throughout the negotiations and that she believed the CEA’s opposition to the payment of bonuses to be clear.

Puchalla testified that it was her belief that the District intended to pay Hintz \$24,000 regardless of how the negotiations proceeded. Puchalla further testified that she believed Coe was clear in communicating the CEA’s position that it did not approve of the use of a signing bonus.

The CIR entered its order on May 1, 2001, finding that by directly communicating with Hintz in April 2000 regarding his base salary of \$24,000, and in August 2000 regarding his signing, the District engaged in impermissible direct dealing in violation of § 48-824(2)(a), (e), and (f). The CIR further found that

payment of \$2,350 in the form of a signing bonus, per the August 2000 agreement, was in violation of the collective bargaining agreement and § 48-824(2)(a) and (e).

The CIR further concluded that the CEA had not waived its right to object to the signing bonuses, nor had it waived its right to file a claim with the CIR by failing to first file a grievance pursuant to the negotiated agreement. Finally, the CIR found that the parol evidence rule prevented the consideration of any statements relating to the use of signing bonuses in an attempt to reform the final negotiated bargaining agreement.

The CIR granted several remedies to the CEA. First, while it allowed the District to pay Hintz the disputed signing bonus for the 2000-2001 school year, it ordered the District to cease and desist from paying that bonus after August 1, 2001. The District was further ordered to cease and desist from the payment of any signing bonuses or other compensation which would otherwise be the subject of mandatory bargaining and was not contained in a negotiated agreement. In addition, the District was ordered to cease and desist from deviating from the negotiated agreement and to cease and desist from directly dealing with its represented employees on matters which constituted terms and conditions of employment. Finally, the District was ordered to post notices explaining that it had engaged in prohibited labor practices and would not do so again in the future. The District appealed.

III. ASSIGNMENTS OF ERROR

The District assigns, restated, that the CIR erred in (1) failing to find that the CEA negotiated in bad faith thereby “bar[ring] it from litigating . . . the issue of a signing bonus”; (2) refusing to consider parol evidence in the course of negotiations between the CEA and the District pertaining to the payment of signing bonuses; (3) finding that the District engaged in direct dealing; (4) failing to find that the CEA had “waived its right” to complain about the District’s payment of a bonus by failing to file a grievance pursuant to the negotiated agreement; and (5) entering declaratory and injunctive relief, which exceeded “the commission’s limited statutory authority and is, therefore, contrary to law.”

IV. STANDARD OF REVIEW

[1] Our scope of review of CIR orders relating to § 48-824 violations is specifically set forth in § 48-825(4), which states:

Any order or decision of the commission may be modified, reversed, or set aside by the appellate court on one or more of the following grounds and no other:

(a) If the commission acts without or in excess of its powers;

(b) If the order was procured by fraud or is contrary to law;

(c) If the facts found by the commission do not support the order; and

(d) If the order is not supported by a preponderance of the competent evidence on the record considered as a whole.

See *Nebraska Pub. Emp. v. Otoe Cty.*, 257 Neb. 50, 595 N.W.2d 237 (1999).

[2,3] In an appeal from a CIR order regarding § 48-824 prohibited practices, concerning a factual finding, we will affirm that finding if, considering the whole record, a trier of fact could reasonably conclude that the finding is supported by a preponderance of the competent evidence. This court will consider the fact that the CIR, sitting as the trier of fact, saw and heard the witnesses and observed their demeanor while testifying and will give weight to the CIR's judgment as to credibility. *Id.*

V. ANALYSIS

1. BAD FAITH

In its first assignment of error, the District asserts the CIR erred in failing to find the CEA negotiated in bad faith. The District contends the CEA acted in bad faith by first suggesting the payment of bonuses and then filing suit in the CIR when that course of action was followed. According to the District, Coe's statement that there was "no board policy which prevents" the District from paying a bonus waived any right the CEA had to complain about the District's payment of a signing bonus to Hintz.

The District relies on *Century Electric Motor Company v. N. L. R. B.*, 447 F.2d 10 (8th Cir. 1971), decided under the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq.

(2000), for the proposition that it is bad faith for a union to remain silent on an issue of possible contention and then sue after an agreement is finalized. See, *Nebraska Pub. Emp. v. Otoe Cty.*, *supra*; *University Police Officers Union v. University of Nebraska*, 203 Neb. 4, 277 N.W.2d 529 (1979) (determining that cases decided under NLRA can be helpful in interpreting NIRA, but are not binding).

In *Century Electric Motor Company v. N. L. R. B.*, *supra*, an employer announced to its employees in late November 1968 that it would be unable to pay a Christmas bonus that year. At the time the announcement was made, the employer was involved in negotiations with the employees' union. On December 10, the two sides met to finalize their bargaining agreement. Though the members of the union's negotiating team were aware that there would be no Christmas bonuses that year, they did not complain about that fact at the final negotiating session. One week after a new agreement was finalized, the union attempted to force the employer to negotiate over the Christmas bonus for that year. When the employer refused, the union sued, arguing that since the bonus was a wage, hour, term, or condition of employment, the employer could not unilaterally withdraw it. The court rejected the union's argument, stating:

The statutory purpose of having general collective bargaining agreements negotiated would inherently seem to be to have the parties engage in good-faith endeavor to effect as full a basis as possible for securing harmonious relations between them. This intent of the [NLRA] is not being properly served if the parties do not deal with each other in that approach and spirit in their negotiation of such an agreement. An attempt by either party in such a general negotiation to conceal and withhold some harbored grievance of which the other is not aware, in order to avoid discussion and possible fusion on it and so to keep the door open to subsequent controversy and contention between them, is not conduct which is entitled to administrative or judicial approbation, nor should it be lightly made the subject of any unrequired ancillary rewarding.

Century Electric Motor Company v. N. L. R. B., 447 F.2d at 13.

Century Electric Motor Company is distinguishable. In the case before us, the CIR found:

The record reveals that there were no false representations or concealment of material facts on the part of the Association. On the contrary, the Association in negotiations with the District clearly stated that while the Association's representative could find no board policy which prevented the district from giving a bonus, the Association did not endorse or approve of such bonuses. We find no evidence in the record that this representation was false, nor do we find that the Association tried to conceal any policy.

It is clear from the record that the discussions between the District and the CEA concerning wages, hours, and other terms and conditions of employment included a dialog regarding signing bonuses. The parties, however, dispute the manner in which this dialog was resolved. The District maintains it left the final negotiating session on August 8, 2000, thinking it could pay bonuses, based in part upon the August 8 minutes wherein Coe is recorded to have said that "[t]here is not a board policy that he [Coe] is aware of that prohibits them from giving a bonus" The CEA, on the other hand, maintains it left believing it had made its opposition to bonuses clear, also relying, in part, on the August 8 minutes wherein it is further recorded that "Mike Coe explained again that there is no board policy which prevents the board from giving a bonus but that the Negotiation Team did not endorse or approve of it."

The issue before us on appeal is not whether there was evidence to support the District's claim, but whether, considering the whole record, a trier of fact could reasonably conclude that the finding is supported by a "preponderance of competent evidence." *Nebraska Pub. Emp. v. Otoe Cty.*, 257 Neb. 50, 53-54, 595 N.W.2d 237, 245 (1999). Accord § 48-825(4)(d). Based upon our review of the record, we determine that the CIR's findings on the issue of bad faith were supported by a preponderance of competent evidence, were within the scope of the CIR's statutory authority, and were not contrary to law. Accordingly, the District's first assignment of error is without merit.

2. PAROL EVIDENCE

In its second assignment of error, the District argues that the CIR erred in refusing to consider parol evidence regarding the course of negotiations between the CEA and the District. The District first contends this evidence should have been considered to show that (1) the CEA negotiated in bad faith, (2) the issue of signing bonuses was “actually negotiated,” and (3) the signing bonus agreement supplemented the negotiated agreement and was not parol evidence. Brief for appellant at 18. Assuming, without deciding, the CIR erred in failing to admit some evidence related to the course of negotiations, we nonetheless conclude that a substantial amount of evidence regarding the purported relationship between signing bonuses and the negotiation process was received and considered by the CIR.

At the hearing before the CIR, Dr. Fero was asked by one of the District’s attorneys whether there was anything that was not expressed in the written negotiated agreement that he believed to be a part of the agreement. The CEA made a parol evidence objection. The following exchange between one of the District’s attorneys and the CIR judge then took place:

[CIR judge:] Are you — so you are asking for an interpretation of this? Or —

[District’s counsel:] No, sir. No. I — I can approach it differently by asking him what happened in negotiations. And we’ll get to the same end.

[CIR judge:] I am concerned about the parol evidence rule as altering or seeking to interpret an otherwise unambiguous document. We haven’t talked about whether this is ambiguous or not. If you can get it, what you’re getting at in a different way, I think it would be better.

I will sustain the objection on the basis of the parol evidence rule and allow you to proceed.

At that point, Dr. Fero proceeded to relate the chronology of the negotiations between the parties, including statements regarding the payment of bonuses:

[District’s counsel:] Okay. Now, let’s go to August 8th of 2000, the negotiating session, the minutes of which
. . . [state], “Mike Coe explained CEA wanted to keep the current index. There is not a board policy that he is

aware of that prohibits them from giving a bonus because it would not affect the salary index.”

The penultimate paragraph . . . says, “Mike Coe explained again that there is no board policy which prevents the board from giving a bonus but that the negotiation team did not endorse or approve of it.”

In prior negotiating sessions, had the Board of Education proposed starting salaries of 24,000 or \$23,650?

[Dr. Fero:] Prior to Proposal No. 7, which was the . . . final accepted by both sides, there were six offers by the Board . . . and there were six offers made by the CEA. All six . . . offered either above or just under 24. . . .

. . . .

The board made . . . it very clear from the very outs[et] of negotiations that it . . . wanted to have the starting salary at \$24,000. . . .

The board . . . wanted to be competitive. . . .

. . . .

. . . And it was discussed upon how can we get to 24 — how can we attract teachers if you’re at \$21,700

And the response was, well, you can’t give signing bonuses, we don’t approve of it, we don’t like it but there’s nothing in board policy that prohibits you from doing that.

Q. When you say the response was, who are you referring to? Mr. Coe?

A. Mr. Coe.

. . . .

Q. Then let me ask you to focus on this. You said from the outset. Do you mean from the first negotiating session . . . you raised the issue of Mr. Hintz and the amount of pay that the board had committed to paying him?

. . . .

A. Yes, we did.

. . . .

Q. Okay. Now, you were discussing it at the negotiating session on August 10th of — or August 8th of 2000, the last session? That’s the — reflected in the minutes

A. Correct.

Q. . . . Mr. Coe is listed in these exhibits as saying that there is — he's not aware of any board policy that prohibits the board from giving . . . a signing bonus. What did you understand his statements to mean?

A. That what we had done with Mr. Hintz they did not approve of but they saw no reason why we couldn't do it.

The whole — the whole part up to where [the minutes] says the board asked to caucus, everything was how do we attract teachers into this district, especially in extremely difficult areas to fill.

We discussed this at great length. And they said the CEA said there isn't any problem with giving bonuses. . . .

. . . .

. . . I understood that the — and the board negotiating committee understood that to mean that the CEA was saying its okay to pay bonuses.

The record further shows the CIR considered the course of negotiations in its decision and order. The CIR's order states:

During negotiations, Mike Coe, an Association representative, informed the Board that he knew of no law or Board policy which would prevent the Board from giving teachers bonuses, but that the Association's negotiation team did not endorse or approve bonuses. The District then presented its seventh proposal with a base salary of \$21,650 on a 5 x 4 salary schedule. The parties completed negotiations without reaching impasse and without impasse being declared when the Association accepted this proposal, and the parties signed the 2000-2001 collective bargaining agreement on August 14, 2000

. . . .

. . . [T]he Association in negotiations with the District clearly stated that while the Association's representative could find no board policy which prevented the district from giving a bonus, the Association did not endorse or approve of such bonuses.

[4] This court has held, "An improper exclusion of evidence is ordinarily not prejudicial where substantially similar evidence is admitted without objection." *Leavitt v. Magid*, 257 Neb. 440, 444-45, 598 N.W.2d 722, 726 (1999). The record shows that

substantial evidence was admitted regarding signing bonuses and its effect on the course of negotiations between the parties. The record further demonstrates that such was considered by the CIR. Therefore, any error by the CIR was not prejudicial to the District and is harmless. The District's second assignment of error is without merit.

3. DIRECT DEALING

In its third assignment of error, the District argues the CIR erred in finding that it had engaged in direct dealing in violation of § 48-824(2)(a) and (e). For the sake of completeness, we note that the District makes no specific argument with respect to the CIR's findings (1) that the District's actions were direct dealing in violation of § 48-824(2)(f) or (2) that the District's unilateral actions in paying the signing bonuses violated the collective bargaining agreement and § 48-824(2)(a) and (e). We therefore limit our analysis to the specific arguments of the District. Section 48-824(2)(a) and (e) states:

It is a prohibited practice for any employer or the employer's negotiator to:

(a) Interfere with, restrain, or coerce employees in the exercise of rights granted by the Industrial Relations Act;

....

(e) Refuse to negotiate collectively with representatives of collective-bargaining agents as required by the Industrial Relations Act.

[5] Section 48-824(2)(a) and (e) are similar to § 8(a)(1) and (5) of the NLRA, codified at 29 U.S.C. § 158(a)(1) and (5) (2000). As recognized earlier, we have said that cases decided under the NLRA can be helpful in interpreting the NIRA, but are not binding. See, *Nebraska Pub. Emp. v. Otoe Cty.*, 257 Neb. 50, 595 N.W.2d 237 (1999); *University Police Officers Union v. University of Nebraska*, 203 Neb. 4, 277 N.W.2d 529 (1979). We therefore look to federal decisions interpreting § 8(a)(1) and (5) for guidance.

The District cites *Permanente Medical Group, Inc.*, 332 N.L.R.B. No. 106 (Oct. 31, 2000), as setting forth the appropriate analysis when evaluating a claim of direct dealing. The analysis employed in *Permanente Medical Group, Inc.* has been

applied to labor relations cases by the U.S. Supreme Court. See *Medo Corp. v. Labor Board*, 321 U.S. 678, 64 S. Ct. 830, 88 L. Ed. 1007 (1944). We agree with the District that *Permanente Medical Group, Inc.* provides an appropriate test and proceed to evaluate the District's claim under its holding.

In *Permanente Medical Group, Inc.*, *supra*, the NLRB identifies the elements of direct dealing as follows: (1) The employer was communicating directly with union-represented employees; (2) the discussion was for the purpose of establishing wages, hours, and terms and conditions of employment or undercutting the collective bargaining unit's role in bargaining; and (3) such communication was made to the exclusion of the collective bargaining unit. We will discuss these elements below.

(a) Dealing With Hintz to Exclusion of CEA

The District first argues that it did not engage in direct dealing with Hintz because direct dealing requires that the collective bargaining agent be excluded, and in this case, it contends, the CEA was not excluded. The CIR's order with respect to this issue found in relevant part:

[T]he District met with Mr. Hintz and communicated with him directly for the purpose of establishing his wages. This communication was to the exclusion of the Association; the Association had absolutely no input before the District and Mr. Hintz agreed to a salary of \$24,000 per year. After the collective bargaining agreement was entered, the District again met with Mr. Hintz on August 30, 2000 to set forth in writing that his annual compensation would total \$24,000

The CIR found that the District engaged in direct dealing with Hintz on two separate occasions—in April 2000 when Hintz and the District agreed to a contract for \$24,000 and on August 30 when Hintz and the District entered into the signing bonus agreement.

(i) April Actions

[6] Direct dealing occurs when an employer "undercuts" the authority of a collective bargaining agreement by negotiating directly with an individual employee regarding a mandatory subject of bargaining. *Permanente Medical Group, Inc.*, *supra*.

When the District made its initial offer to Hintz in April, he was not an employee of the District; nor is there evidence in the record to suggest that the April negotiations with Hintz would be covered by any other agreement between the District and the CEA. The CIR's finding that the District engaged in direct dealing in April 2000 is not supported by a preponderance of the evidence and is in error.

(ii) August Actions

The August 30, 2000, communication regarding the signing bonus, however, presents a different factual circumstance. On the date the signing bonus agreement was entered into, Hintz was an employee of the District and subject to the terms of the 2000-2001 negotiated agreement. By communicating with Hintz and thereafter entering into the "bonus" agreement, the District contracted for a different, higher starting salary. As a result, the agreement regarding signing bonuses clearly dealt with Hintz' wages. The CEA was not involved in the signing bonus agreement entered into between the District and Hintz, nor was it officially informed that such an agreement had been made.

The District cites *Toledo Typographical Union No. 63 v. N.L.R.B.*, 907 F.2d 1220, 1222 (D.C. Cir. 1990), for the proposition that "[a]n employer may deal directly with its employees over any lawful matter if it first obtains the consent of their union." This argument presupposes that the negotiations between the CEA and the District resulted in an understanding that signing bonuses could be paid, thus permitting the District to approach individual teachers to negotiate such a bonus. The CIR heard evidence pertaining to signing bonuses and the negotiation process and found that there was no understanding or agreement reached between the parties on that issue. Since we have earlier affirmed such finding, the District's argument that it had the consent of the CEA in that signing bonuses were negotiated, and thus did not act to the exclusion of the CEA, is without merit.

(b) Signing Bonus as Wage, Hour,
or Condition of Employment

[7] The District next argues that it did not engage in direct dealing because a signing bonus is not a wage, hour, or condition of employment. "[W]ages, hours, and other terms and conditions

of employment or any question arising thereunder” are considered to be mandatory subjects of bargaining under the NIRA. See § 48-816(1). The CIR found that the bonus paid to Hintz was part of his wages, and thus a mandatory subject of bargaining.

The District relies on *N. L. R. B. v. Wonder State Manufacturing Company*, 344 F.2d 210 (8th Cir. 1965), to support its contention that bonuses are not the subject of mandatory bargaining. In *Wonder State Manufacturing Company*, the Eighth Circuit found that an employer was permitted to unilaterally withdraw a Christmas bonus over a union objection that the bonus was a subject of mandatory bargaining. The court emphasized that there had been no regularity in the paying of the bonus by the employer, there was no uniformity in how the employer determined the amount of the bonus, the bonus was not tied to the employee’s usual remuneration, and whether a bonus was paid was tied to the financial condition and ability of the employer to afford to pay such a bonus. The District contends those same factors are present in this case: “The District had never before paid any type of signing bonus. There was no uniform bonus amount, because this was a one-time situation. Finally, the bonus was paid to Hintz because the District faced an exigency that demanded unique action.” Brief for appellant at 27.

However, the court in *N. L. R. B. v. Wonder State Manufacturing Company*, 344 F.2d at 213, explained:

The rule is that gifts per se—payments which do not constitute compensation for services—are not terms and conditions of employment, and an employer can make or decline to make such payments as he pleases, *but if the gifts or bonuses are so tied to the remuneration which employees received for their work that they were in fact a part of it, they are in reality wages and within the statute.* (Emphasis supplied.) See, also, *N. L. R. B. v. Electric Steam Radiator Corporation*, 321 F.2d 733 (6th Cir. 1963) (containing similar language). In this case, the CIR found that “[a]fter the collective bargaining agreement was entered, the District again met with Mr. Hintz on August 30, 2000 to set forth in writing that his annual compensation would total \$24,000, including a ‘signing bonus’ of \$2,350.” It is undisputed in the record that the “‘signing bonus’” was to be paid to Hintz in 12 equal installments, the

sum of which, when added to his base salary of \$21,650, totaled \$24,000. The CIR's finding that the bonus was a wage is, considering the whole record, supported by a preponderance of the competent evidence, is within the scope of the CIR's statutory authority, and is not contrary to law. See, *Nebraska Pub. Emp. v. Otoe Cty.*, 257 Neb. 50, 595 N.W.2d 237 (1999); § 48-825(4). The District's third assignment of error is without merit.

4. WAIVER

In its fourth assignment of error, the District asserts that the CEA waived any right to "complain" about the District's paying of a bonus to Hintz due to its failure to comply with the grievance procedure set forth in the negotiated agreement between the parties. The CEA admits that no grievance was filed prior to filing its petition with the CIR.

Article IX of the 2000-2001 negotiated agreement states that "[g]rievances shall be filed and processed according to the procedure outlined in Appendix D." Appendix D defines a grievant as "any teacher, group of teacher [sic], or the association filing the grievance" and includes both an informal and formal procedure. See *Pfizer v. Lancaster Cty. Bd. of Equal.*, 260 Neb. 265, 616 N.W.2d 326 (2000) (word "or" when used properly is disjunctive). In accordance with appendix D, the informal procedure is implemented as follows: "a. A *teacher* who has a grievance should first discuss the matter with his or her department chairman, principal, or supervisor to whom he or she is directly responsible in an effort to resolve the problem." (Emphasis supplied.)

The formal procedure as set forth in appendix D states, in part, at B1(a) of appendix D, that

[i]f an aggrieved person is not satisfied with the disposition of his or her problem, or if no decision has been rendered after seven days through the informal procedure, he or she may submit the claim as a formal grievance, in writing, to the appropriate principal and retain a copy.

Thereafter, at B1(c), it is stated that "[a] *teacher* who is not directly responsible to a . . . principal may submit a form grievance claim to the administrator to whom he or she is directly responsible." (Emphasis supplied.) Finally, under section D2

entitled “**Other Considerations**,” a “written grievance [shall be] filled [sic] within 30 days . . . after the *teacher* knew, or should have known, of the act or condition on which the grievance is based, [or] the grievance shall be waived.” (Emphasis supplied.)

[8,9] Waiver is defined as

a voluntary and intentional relinquishment or abandonment of a known existing legal right or such conduct as warrants an inference of the relinquishment of such right. . . . In order to establish a waiver of a legal right, there must be clear, unequivocal, and decisive action of a party showing such a purpose, or acts amounting to estoppel on his part.

(Citation omitted.) *Wheat Belt Pub. Power Dist. v. Batterman*, 234 Neb. 589, 594, 452 N.W.2d 49, 53 (1990). See, also, *Shelter Ins. Cos. v. Frohlich*, 243 Neb. 111, 498 N.W.2d 74 (1993). The issue is whether the language of the negotiated agreement evidences the CEA’s intention to relinquish its right to bring an action in the CIR without first complying with the grievance procedure. We determine that it does not.

First, as noted earlier, in order for the CEA to have waived its right to immediately file its claim in the CIR, such waiver must be “clear, unequivocal, and decisive.” The language of appendix D is not clear, unequivocal, or decisive. Although the definition of grievant can include the CEA, the grievance procedure, as set forth in appendix D, by its terms, could be read to limit its application to teachers. See *Pfizer v. Lancaster Cty. Bd. of Equal.*, *supra*. Since the CEA is not a teacher, it is not “clear [and] unequivocal” that the CEA must also follow such procedures as a condition precedent to filing an action in the CIR. See *Wheat Belt Pub. Power Dist. v. Batterman*, *supra*.

Furthermore, to effectuate a waiver, the relinquishment must be “voluntary and intentional” and must be of a “known existing legal right.” See *id.* The language of the negotiated agreement makes no mention of the CIR or the NIRA. As the CIR noted in its decision:

The grievance procedure provides that if a grievance is not filed within 30 days after the grievant has knowledge of the alleged wrongful act, then the grievance shall be waived. This, however, does not specifically waive the statutory right to bring a case before the Commission. The Association has

a statutory right to file a prohibited practice case, and its non-filing of a grievance does not waive that right.

We agree with the CIR's finding and determine that the CEA did not waive its statutory right to file a claim with the CIR when it did not file a grievance. The CIR's finding to that effect is not contrary to law. The District's fourth assignment of error is without merit.

5. STATUTORY AUTHORITY

In its fifth and final assignment of error, the District asserts that the CIR's entry of "[d]eclaratory and injunctive relief in this case exceeds the Commission's limited statutory authority, and is, therefore, contrary to law." In its brief, the District appears to argue that the orders entered by the CIR exceeded its authority for two reasons. First, the remedies ordered grant declaratory and injunctive relief; second, the orders provide neither adequate nor appropriate remedies pursuant to §§ 48-819.01 and 48-825(2). We will discuss each separately.

In its decision, the CIR ordered the District, restated and summarized, to cease and desist from (1) deviating from the negotiated agreement in payment of salaries and benefits; (2) paying Hintz in deviation from the negotiated agreement after August 1, 2001; (3) bypassing the CEA and dealing directly with its represented employees regarding wages, terms, and conditions of employment; and (4) paying teachers "'signing bonuses'" or other compensation that is a mandatory subject of bargaining and is not included in a negotiated agreement. The CIR further ordered the District to post notices informing employees that it had engaged in prohibited labor practices.

[10,11] The CIR does not have authority to grant declaratory or equitable relief. See, *Calabro v. City of Omaha*, 247 Neb. 955, 531 N.W.2d 541 (1995); *Transport Workers of America v. Transit Auth. of City of Omaha*, 205 Neb. 26, 286 N.W.2d 102 (1979). Furthermore, this court has noted that the CIR is an administrative body performing a legislative function. *Transport Workers of America v. Transit Auth. of City of Omaha*, *supra*. Thus, it has only those powers delineated by statute, *Jolly v. State*, 252 Neb. 289, 562 N.W.2d 61 (1997), and should "exercise that jurisdiction in as narrow a manner as may be necessary," *University Police*

Officers Union v. University of Nebraska, 203 Neb. 4, 18, 277 N.W.2d 529, 537 (1979).

[12] In its petition, the CEA did not request declaratory relief. The CEA's petition alleged the existence of a pending dispute, namely whether the District engaged in prohibited labor practices by paying Hintz a bonus contrary to the 2000-2001 negotiated agreement. In *Ryder Truck Rental v. Rollins*, 246 Neb. 250, 257, 518 N.W.2d 124, 128 (1994), we observed that "[t]he function of a declaratory judgment is to determine justiciable controversies which either are not yet ripe for adjudication by conventional forms of remedy or, for other reasons, are not conveniently amenable to the usual remedies." In this case, the CIR was confronted with a pending dispute. Its order did not grant declaratory relief.

[13] Nor did the Commission's orders, despite any similarity in language, grant equitable or injunctive relief. Injunctive relief is generally preventative, prohibitory, or protective. *Putnam v. Fortenberry*, 256 Neb. 266, 589 N.W.2d 838 (1999). Black's Law Dictionary 784 (6th ed. 1990) defines injunction as follows:

A court order prohibiting someone from doing some specified act or commanding someone to undo some wrong or injury. A prohibitive, equitable remedy issued . . . by a court . . . directed to a party . . . forbidding the latter from doing some act . . . or restraining him in the continuance thereof A judicial process . . . requiring [a] person to whom it is directed to do or refrain from doing a particular thing.

The CIR is not a court, but an administrative body performing a legislative function. *Transport Workers of America v. Transit Auth. of City of Omaha*, *supra*. Its orders are not issued by a court and are merely advisory, given the CIR has no enforcement authority. The enforcement of any order issued by the CIR resides only in the district courts of this state. See §§ 48-819 (failure on part of any person to obey order of CIR shall constitute contempt, and upon application to appropriate district court, shall be dealt with as would similar contempt of said district court) and 48-825(2) (upon finding that party has committed prohibited practice, any remedy ordered by CIR can be enforced by district court only upon filing of action seeking injunctive relief).

The orders issued by the CIR in this case did not command, forbid, or restrain the District. They were not issued by a court, are merely advisory, and therefore, do not grant injunctive relief.

Having concluded that the orders of the CIR provided neither declaratory nor injunctive relief, we now consider whether they were “adequate” and “appropriate” remedies pursuant to §§ 48-819.01 and 48-825(2).

The remedies fashioned by the CIR essentially fall into two categories. The first category, identified above in Nos. (1) through (4), ordered the District to cease and desist from certain actions. The second category ordered the District to post notices informing employees that it had engaged in prohibited labor practices. We will discuss each category separately.

[14] Section 48-825(2) authorizes the CIR, upon a finding that a party has committed a prohibited practice, to “order an appropriate remedy.” The District argues that the cease and desist orders are not appropriate and therefore contrary to law.

What is considered an appropriate remedy pursuant to § 48-825(2) is an issue of first impression. However, § 48-819.01 contains remedial language similar to § 48-825(2). Section 48-819.01 provides:

Whenever it is alleged that a party to an industrial dispute has engaged in an act which is in violation of any of the provisions of the Industrial Relations Act, or which interferes with, restrains, or coerces employees in the exercise of the rights provided in such act, the commission shall have the power and authority to make such findings and to enter such temporary or permanent orders as the commission may find necessary to provide adequate remedies to the injured party or parties, to effectuate the public policy enunciated in section 48-802, and to resolve the dispute.

(Emphasis supplied.) We therefore look to § 48-819.01 to aid us in determining what are appropriate remedies under § 48-825(2).

In *Transport Workers v. Transit Auth. of Omaha*, 216 Neb. 455, 344 N.W.2d 459 (1984), this court was presented with the issue of whether the CIR had the authority to enter temporary orders concerning wages, hours, and terms and conditions of employment while the CIR was attempting to resolve a labor dispute pending before it. Relying in part upon the version of

§ 48-819.01 then in effect, which is substantially similar to the current § 48-819.01, we observed:

To be sure, the authority of the CIR to enter temporary orders is not unlimited. As we noted in *University Police Officers Union v. University of Nebraska*, *supra* at 18, 277 N.W.2d at 537: "We will not now attempt to enumerate all the possible circumstances under which the CIR may exercise its authority. We do note, however, that the authority granted to the CIR under the present act in general and section 48-816, R.R.S. 1943, in particular, is limited in nature. We would anticipate that the CIR will exercise that jurisdiction in as narrow a manner as may be necessary." The authority does, however, appear to be sufficient in this case. To hold otherwise would be to completely repeal §§ 48-816 and 48-819.01 by judicial fiat.

Transport Workers v. Transit Auth. of Omaha, 216 Neb. at 460, 344 N.W.2d at 463.

Having found violations of the NIRA, §§ 48-819.01 and 48-825(2) grant the CIR authority to issue such orders as it may find necessary to provide adequate remedies to the parties to effectuate the public policy enunciated in § 48-802. This court has previously commented upon the authority of the CIR to issue cease and desist orders. In *University Police Officers Union v. University of Nebraska*, 203 Neb. 4, 16-17, 277 N.W.2d 529, 537 (1979), we discussed § 48-811 and observed:

The provisions of section 48-811, R. R. S. 1943, do not constitute matters similar to those prescribed in sections 8a and 8b of the NLRA. Thus, the CIR does not, by reason of section 48-811, R. R. S. 1943, have authority to declare unfair labor practices. If, in fact, the evidence discloses that a public employer is threatening or harassing an employee because of any petition filing by such employee, the CIR is limited to entering an order directing the employer to cease and desist such threat or harassment. The CIR has no authority, however, to require anything further. Upon failure of the public employer to cease and desist, action must be brought by the employee in the appropriate District Court seeking to hold the public employer guilty of contempt of court.

[15] In our view, the remedies provided by the CIR are nothing more than the CIR's ordering the District to cease and desist violating the terms of the negotiated agreement and are one of the "'circumstances under which the CIR may exercise its authority.'" *Transport Workers v. Transit Auth. of Omaha*, 216 Neb. at 460, 344 N.W.2d at 463. To prohibit the CIR from issuing such relief under these circumstances would be to repeal §§ 48-819.01 and 48-825(2) "by judicial fiat." *Id.*

Having concluded that the cease and desist orders issued by the CIR were "adequate" and "appropriate" under §§ 48-819.01 and 48-825(2), we now determine whether the CIR's order requiring the posting of notices was an "adequate" and "appropriate" remedy under these facts.

The District, in arguing that the CIR has no such authority, relies in part upon *University Police Officers Union v. University of Nebraska*, 203 Neb. at 17, 277 N.W.2d at 537, wherein this court stated:

We note that the CIR directed UNL to post a copy of its temporary order, and in its opinion of December 20, 1977, suggested it was considering requiring UNL to post "mea culpa" notices. The CIR is without authority to make such orders. Its authority is limited to the provisions of section 48-818, R. R. S. 1943, wherein it is provided that the CIR's findings and orders may establish or alter the scale of wages, hours of labor, or conditions of employment.

However, *University Police Officers Union* was decided prior to the enactment of §§ 48-819.01 and 48-825. We therefore consider the CIR's authority to require the posting of notices within the statutory framework of identifying "adequate" and "appropriate" remedies.

In this case, it is difficult to envision how the posting of notices provides an adequate and appropriate remedy to the CEA. The CEA's grievances were remedied by the CIR's finding that the District had engaged in prohibited labor practices and its issuance of the cease and desist orders. Clearly, those remedies are adequate to resolve the dispute.

Furthermore, the mere posting of these notices does not appear to effectuate the public policy underlying the NIRA. That policy provides that

[t]he continuous, uninterrupted and proper functioning and operation of governmental service . . . to the people of Nebraska are hereby declared to be essential to their welfare, health and safety. It is contrary to the public policy of the state to permit any substantial impairment or suspension of the operation of governmental service It is the duty of the State of Nebraska to exercise all available means and every power at its command to prevent the same so as to protect its citizens from any dangers, perils, calamities, or catastrophes which would result therefrom.

§ 48-802(1). Under these facts, we fail to see any relationship between the policy stated in § 48-802 and the posting of notices relating to the employer's engagement in prohibited labor practices under the NIRA.

Accordingly, we determine that ordering the District to post notices regarding its NIRA violation is, under the facts, not a proper remedy and therefore in excess of the CIR's powers. Such order is reversed.

Finally, the District argues that if § 48-819.01 gives the CIR the authority to issue declaratory and injunctive relief, then § 48-819.01 is unconstitutional as granting powers in violation of the Constitution of the State of Nebraska. However, we need not reach that issue, having determined that in this case, the CIR did not order such relief.

VI. CONCLUSION

The CIR's order is affirmed insofar as it (1) found that the District engaged in prohibited labor practices; (2) ordered the District to cease and desist from deviating from the negotiated agreement in payment of salaries and benefits; (3) ordered the District to cease and desist from paying Hintz in deviation from the negotiated agreement after August 1, 2001; (4) ordered the District to cease and desist from bypassing the CEA and dealing directly with its represented employees regarding wages, terms, and conditions of employment; and (5) ordered the District to cease and desist from paying teachers signing bonuses or other compensation that is a mandatory subject of bargaining and which is not included in a negotiated agreement.

The CIR's order is reversed insofar as it (1) found that the District engaged in prohibited labor practices in communicating with Hintz in April 2000 and (2) ordered the District to post notices regarding its violation of the negotiated agreement.

AFFIRMED IN PART, AND IN PART REVERSED.

ROBERT I. MARSHALL, APPELLANT, v. DAWES COUNTY BOARD
OF EQUALIZATION AND TAX EQUALIZATION AND REVIEW
COMMISSION OF NEBRASKA, APPELLEES.
ALFRED V. BARTLETT, APPELLANT, v. DAWES COUNTY BOARD
OF EQUALIZATION AND TAX EQUALIZATION AND REVIEW
COMMISSION OF NEBRASKA, APPELLEES.
654 N.W.2d 184

Filed December 13, 2002. Nos. S-02-068, S-02-069.

1. **Taxation: Judgments: Appeal and Error.** Decisions rendered by the Tax Equalization and Review Commission shall be reviewed by the court for errors appearing on the record of the commission.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. However, in instances when an appellate court is required to review cases for error appearing on the record, questions of law are nonetheless reviewed de novo on the record.
3. **Taxation: Statutes: Appeal and Error.** The plain language in Neb. Rev. Stat. § 77-5019(2)(a) (Cum. Supp. 2002) referring to "the action complained of" refers to the particular Tax Equalization and Review Commission order being appealed and does not refer to a previous order of the commission which might be relevant to issues in the current appeal.

Appeals from the Nebraska Tax Equalization and Review Commission. Affirmed.

Laurice M. Margheim, of Curtiss, Moravek, Curtiss & Margheim, and Russell W. Harford, of Crites, Shaffer, Connealy, Watson & Harford, for appellants.

Dennis D. King, of Smith, King, and Freudenberg, P.C., for appellee Dawes County Board of Equalization.

Don Stenberg, Attorney General, and L. Jay Bartel for appellee Nebraska Tax Equalization and Review Commission.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

In this consolidated appeal, Robert I. Marshall in case No. S-02-068 and Alfred V. Bartlett in case No. S-02-069 appeal from an order of the Nebraska Tax Equalization and Review Commission (TERC) reversing determinations made by the Dawes County Board of Equalization. Marshall and Bartlett and other parties previously appealed an earlier TERC decision in which TERC had affirmed determinations by the board. *Bartlett v. Dawes Cty. Bd. of Equal.*, 259 Neb. 954, 613 N.W.2d 810 (2000) (*Bartlett I*). (Note: Because Marshall and Bartlett were part of the original group of taxpayers in *Bartlett I*, in our discussions of either *Bartlett I* or the current appeal, we will refer to the plaintiffs as “the taxpayers.”) In *Bartlett I*, we reversed TERC’s decision and remanded the cause to TERC with orders to remand the taxpayers’ consolidated protests of 1998 agricultural real property valuations to the board for further proceedings. On remand, the board again denied the taxpayers’ protests with respect to certain properties, and the taxpayers appealed to TERC. The appeals were consolidated, and TERC reversed the board’s decisions and ordered that the valuations of the subject properties be reduced to the amounts requested by the taxpayers. The valuation of Bartlett’s property was reduced from \$73,520 to \$38,350. The valuation of Marshall’s property was reduced from \$59,430 to \$28,970. Notwithstanding the fact that the taxpayers received the reduction in valuations they initially sought in their valuation protests, the taxpayers nevertheless appeal TERC’s order on the basis that TERC did not further order adjustment and equalization of 1998 valuations for all agricultural real property throughout Dawes County or order the board to do so. Because the relief TERC ordered is adequate, we affirm TERC’s order.

STATEMENT OF FACTS

The facts of prior proceedings are set forth more fully in *Bartlett I*. A summary of facts relevant to the current appeal follows. On May 14, 1998, TERC issued a written order, purportedly pursuant to Neb. Rev. Stat. § 77-5023 (Cum. Supp. 1998), adjusting values of the agricultural subclasses of property in Dawes County. The Dawes County assessor complied with TERC's order and implemented the adjustments. These adjustments caused the valuations of the taxpayers' properties to nearly double. The taxpayers filed property valuation protests with the board. The board filed its own petition with TERC pursuant to Neb. Rev. Stat. § 77-1504.01 (Cum. Supp. 1998), asking TERC to issue a stay or reverse TERC's order of May 14. TERC dismissed the board's petition on August 7. The board then denied the taxpayers' protests, and the taxpayers appealed to TERC. On September 22, 1999, TERC issued an order affirming the board's denial of the protests. In the order, TERC determined that the issues raised by the taxpayers constituted a collateral attack on TERC's prior orders of May 14 and August 7, 1998.

The taxpayers appealed the September 22, 1999, order to this court. *Bartlett I*. Noting that the taxpayers had filed valuation protests, we concluded that the taxpayers' appeals to TERC were not a collateral attack on TERC's prior orders because the protest procedure and appeals therefrom were the taxpayers' sole method of challenging the property valuations. We determined that TERC's May 14, 1998, order, which purported to adjust subclasses of agricultural land, was based on "market areas" which were not a subclass recognized by statute and that TERC was without authority to order the adjustment by market areas. We noted that the board essentially took no action on the taxpayers' protests and simply awaited the outcome of its own petition to TERC. Therefore, in *Bartlett I*, we reversed TERC's September 22, 1999, order and concluded that "TERC must remand these consolidated protests to the board for a determination on the merits, taking into consideration our determination that TERC's May 14, 1998, order in which it adjusted agricultural land values by market areas was unauthorized." 259 Neb. at 966, 613 N.W.2d at 819.

Pursuant to *Bartlett I*, TERC remanded the taxpayers' protests to the board. On remand from TERC, the board denied the taxpayers' requests for relief as to certain properties. The taxpayers appealed the board's decision to TERC, claiming, inter alia, that the board's action did not comply with this court's decision in *Bartlett I*.

On December 21, 2001, TERC entered an order vacating and reversing the board's decision and granting the taxpayers' requests for reductions in the assessed values of the subject properties. Finding that the only proper evidence regarding the values of the subject properties for the 1998 tax year was that offered by the taxpayers, TERC ordered that the 1998 valuations of the taxpayers' properties be reduced to the amounts requested by the taxpayers in their protests. TERC denied the taxpayers' further requests that it enter an order adjusting the values of all agricultural land in Dawes County for tax year 1998. Although the taxpayers argued that such an order was required by this court's decision in *Bartlett I*, TERC concluded the protests brought by the taxpayers were limited to the valuation of the subject properties and need not result in an order applicable to all agricultural properties throughout the county. On January 17, 2002, the taxpayers appealed TERC's December 21, 2001, order. TERC asserts that it should not have been named a party to this consolidated appeal.

ASSIGNMENT OF ERROR

On appeal, the taxpayers generally assert, restated and summarized, that TERC erred in failing to take action or requiring the board to take action to reverse all the unauthorized adjustments made pursuant to TERC's May 14, 1998, order and to equalize the 1998 valuations on all agricultural land throughout Dawes County.

STANDARDS OF REVIEW

[1,2] Decisions rendered by TERC shall be reviewed by the court for errors appearing on the record of TERC. Neb. Rev. Stat. § 77-5019(5) (Cum. Supp. 2002); *Bethesda Found. v. Buffalo Cty. Bd. of Equal.*, 263 Neb. 454, 640 N.W.2d 398 (2002). When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported

by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Bethesda Found., supra*; *County of Douglas v. Nebraska Tax Equal. & Rev. Comm.*, 262 Neb. 578, 635 N.W.2d 413 (2001). However, in instances when an appellate court is required to review cases for error appearing on the record, questions of law are nonetheless reviewed de novo on the record. *Id.*

ANALYSIS

TERC as Party.

TERC asserts that it should not have been made a party to the present appeal and that it should therefore be dismissed from this appeal. In this regard, TERC notes that § 77-5019(2)(a) provides that TERC “shall only be made a party of record if the action complained of is an order issued by the commission [TERC] pursuant to section 77-1504.01 or 77-5023.” TERC asserts that the order appealed from was issued pursuant to Neb. Rev. Stat. § 77-5018 (Cum. Supp. 2002), not § 77-1504.01 or § 77-5023, and therefore it should not have been made a party to this appeal.

Section 77-1504.01 provides that a county board of equalization may petition TERC to consider an adjustment to a class or subclass of real property within the county and that TERC shall enter an order specifying a percentage increase or decrease and the class or subclass of real property affected by the order. Section 77-5023 provides that TERC has the power to increase or decrease the value of a class or subclass of real property of any county or tax district so that all classes or subclasses in all counties fall within an acceptable range. Finally, § 77-5018 provides that TERC may issue decisions and orders in cases involving appeals of decisions by a county board of equalization or the Property Tax Administrator.

The taxpayers argue that the present appeal is the continuation of the dispute that was previously before this court in *Bartlett I* in which TERC was named as a party. The taxpayers argue that TERC should continue to be a party until the issues raised in *Bartlett I* are resolved in the present appeal. At the time the appeal in *Bartlett I* was filed, § 77-5019(2)(a) (Supp. 1999) provided: “If the Commission’s only role in a case is to act as a neutral fact finding body, the Commission shall not be a party of record. In all other cases, the Commission shall be a party of

record.” Pursuant to a legislative amendment which became effective April 7, 2000, this language was deleted and replaced by the language quoted above, making TERC a party only in cases involving orders pursuant to § 77-1504.01 or § 77-5023.

The taxpayers argue that TERC was a proper party to the appeal in *Bartlett I* under either version of the statute because they claim that “the action complained of” in *Bartlett I* was an order issued pursuant to § 77-5023. The taxpayers do not appear to take issue with TERC’s assertion that the order appealed from in the current appeal was an order issued pursuant to § 77-5018. Instead, the taxpayers argue that because the current appeal is the continuation of issues related to the May 14, 1998, order issued pursuant to § 77-5023 involved in *Bartlett I*, TERC should remain a party to these proceedings. Despite TERC’s having been named a party to the appeal in *Bartlett I*, the appellate record in *Bartlett I* contains a letter filed by TERC stating that the orders appealed from in *Bartlett I* were entered pursuant to § 77-5018 and that because TERC did not view itself as a proper party to *Bartlett I*, it did not intend to file any responsive pleadings.

[3] The determining factor of whether TERC should be a party to this appeal is whether under § 77-5019(2)(a) “the action complained of is an order issued by [TERC] pursuant to § 77-1504.01 or § 77-5023.” We conclude that “the action complained of” in this appeal is the December 21, 2001, order of TERC and that such order was an order issued pursuant to § 77-5018 relating to appeals from decisions of a county board of equalization and not an order pursuant to § 77-1504.01 or § 77-5023. We conclude that the plain language in § 77-5019(2)(a) referring to “the action complained of” refers to the particular TERC order being appealed and does not refer to a previous order of TERC which might be relevant to issues in the current appeal.

In the present appeal, although the taxpayers refer to issues related to an earlier order which they claim TERC issued pursuant to § 77-5023, “the action complained of” in the instant appeal is the December 21, 2001, order involving the appeal of decisions by a board which is an order issued pursuant to § 77-5018. In sum, under § 77-5019(2)(a), TERC is to be made a party to an appeal only when the action complained of is an order issued pursuant to § 77-1504.01 or § 77-5023, and the December 21, 2001,

order complained of in the instant appeal was not issued pursuant to either § 77-1504.01 or § 77-5023. TERC should not have been made a party to this appeal. We therefore dismiss TERC as a party to this appeal.

TERC's Decision.

Although TERC is not a party to this appeal, the taxpayers and the board remain as proper parties, and the appeal may proceed with the taxpayers and the board as parties. In their assignment of error summarized above, the taxpayers generally assert that TERC failed to give full and proper relief because, although the taxpayers were awarded the requested reductions in the 1998 valuations of their individual properties, TERC did not take action or order the board to take action to equalize 1998 valuations on all agricultural land throughout Dawes County. We conclude that TERC did not err in refusing to order countywide adjustments because the relief afforded the taxpayers was adequate and the additional equalization relief the taxpayers seek was not required within the context of the present proceedings which were undertaken as individual property valuation protests.

As detailed above, the present proceedings began in 1998 when the taxpayers filed property valuation protests with the board alleging that certain identified properties owned by the taxpayers were overvalued. Such protests were filed pursuant to Neb. Rev. Stat. § 77-1502 (Cum. Supp. 2002). In *Bartlett I*, we stated:

We have consistently held that a property owner's exclusive remedy for relief from overvaluation of property for tax purposes is by protest to the county board of equalization. *Olson v. County of Dakota*, 224 Neb. 516, 398 N.W.2d 727 (1987); *Riha Farms, Inc. v. Dvorak*, 212 Neb. 391, 322 N.W.2d 801 (1982). An appeal may then be taken from the order of the county board of equalization fixing the assessed value of the property. *Id.* This remedy is full, adequate, and exclusive. *Id.*

259 Neb. at 961, 613 N.W.2d at 816.

The board denied the taxpayers' initial protests, and TERC affirmed the board's decision on appeal. The taxpayers appealed the valuation ruling to this court, and in *Bartlett I*, we reversed the decision of TERC and remanded the cause to TERC with

directions to TERC to remand the cause to the board for further proceedings on the individual protests involved therein consistent with our opinion. *Bartlett I*. As part of our decision in *Bartlett I*, we determined that TERC's May 14, 1998, order was unauthorized, and we directed that upon remand, the board was to take such determination into consideration when conducting further proceedings on the taxpayers' protests.

The protests initiated by the taxpayers in 1998 were the "exclusive remedy for relief from overvaluation" as complained of with respect to the specific pieces of property identified in the property valuation protests. Although TERC's May 14, 1998, order applicable to all agricultural properties in Dawes County was relevant to the issues raised by the taxpayers in their individual protests and in the subsequent appeals to TERC and to this court in *Bartlett I*, the scope of the initial proceedings brought on by the filing of the property valuation protests was limited to a consideration of the valuation of the specific properties identified in the taxpayers' protests.

The remand to the board ordered by this court in *Bartlett I* was limited to further proceedings on the protests originally filed by the taxpayers. Although our analysis in *Bartlett I* unavoidably required an examination of the propriety of the May 14, 1998, order which was applicable to all agricultural properties in Dawes County, our opinion in *Bartlett I* did not expand the scope of the proceedings or direct the relief beyond the properties identified in the taxpayers' individual protests. Although the reasoning of *Bartlett I* may have had an implication beyond the interests of the taxpayers, the remand ordered in *Bartlett I* did not provide relief to all agricultural land in Dawes County.

On remand of these proceedings under *Bartlett I*, the board and TERC were directed to determine proper adjustments to the valuations of the properties that were the subjects of the original protests of the taxpayers in *Bartlett I*. Although the board on remand denied the protests with respect to certain properties, TERC on appeal gave the taxpayers the complete relief initially requested by them with respect to those properties. The relief afforded by TERC was adequate and comports with the relief originally sought by the taxpayers and the terms of this court's remand in *Bartlett I*. We therefore find no error in TERC's failure

to grant the taxpayers relief beyond the relief TERC granted with respect to the taxpayers' specific properties.

The taxpayers' arguments on appeal all relate to TERC's failure to take action or order the board to take action to remedy the adjustments made pursuant to TERC's May 14, 1998, order and to equalize 1998 valuations on all agricultural land throughout Dawes County. Such additional relief was not necessary to resolve the case. There is no merit to the taxpayers' assignment of error. Accordingly, we affirm.

CONCLUSION

We conclude that TERC should not have been made a party to the present appeal, and we therefore dismiss TERC as a party to this appeal. We further conclude that TERC did not err in failing to issue additional orders beyond the individual relief requested by the taxpayers because such additional relief was not required within the context of these proceedings. We therefore affirm TERC's order of December 21, 2001.

AFFIRMED.

IN RE ESTATE OF JOY EVONE CRAVEN, DECEASED.
KATHERINE WEBB, APPELLANT, V. THOMAS CRAVEN,
PERSONAL REPRESENTATIVE OF THE ESTATE OF
JOY EVONE CRAVEN, DECEASED, APPELLEE.

654 N.W.2d 196

Filed December 20, 2002. No. S-01-1223.

1. **Judgments: Appeal and Error.** In a bench trial of a law action, a trial court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous.
2. **Domicile: Intent.** To acquire a domicile by choice, there must be both (1) residence through bodily presence in the new locality and (2) an intention to remain there.
3. ____: _____. Domicile is obtained only through a person's physical presence accompanied by the present intention to remain indefinitely at a location or by the present intention to make a location the person's permanent or fixed home.
4. ____: _____. To change domicile, there must be an intention to abandon the old domicile.
5. **Domicile.** All of the surrounding circumstances and the conduct of the person must be taken into consideration to determine his or her domicile.

Appeal from the County Court for Custer County: GARY G. WASHBURN, Judge. Affirmed.

Michael S. Borders, of Sennett, Duncan & Borders, for appellant.

Michael A. England, of Stumpff, Guggenmos & England, for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

Katherine Webb appeals from the county court's decision determining that her deceased mother, Joy Evone Craven, was domiciled in Nebraska at the time of her death. The sole issue is whether Nebraska or Montana is her domicile. Joy died in Montana. She established a post office box in Montana, obtained a Montana driver's license, and registered a car there. But Joy checked on a change-of-address card filed with the postal service that she was making a temporary move. Furthermore, she had not told others that she planned to permanently move to Montana and had left many items at her home in Nebraska. Because the court's factual determination is not clearly erroneous, we affirm.

BACKGROUND

This case is a dispute between Webb and Thomas Craven, Joy's estranged husband and personal representative of her estate, about Joy's domicile at the time of her death. Joy filed a petition to dissolve her marriage to Thomas in 1998, but the petition was pending at the time of her death.

Joy died in Montana on November 26, 1999. Thomas began an intestate proceeding in Nebraska in December 1999 and was informally appointed personal representative of her intestate estate in January 2000. Formal probate proceedings were filed in Montana by Webb on December 1, 2000. The record contains a document purported to be Joy's will, dated September 19, 1999. The will does not have a domiciliary clause. The record contains evidence about Joy's mental competence at the time the will was signed. The validity of the will, however, is not the subject of this

appeal. An application to determine Joy's domicile was filed in Nebraska in May 2001.

According to Webb, the pending divorce caused friction between members of the family. She stated that her sister, Terry Owens, and her half sister sided with Thomas, while Webb sided with Joy. Webb testified that in late 1998 and early 1999, Joy discussed with her the possibility of moving to Montana to live with her. According to Webb, Joy began making preparations to move in the spring and summer of 1999. Joy contacted a moving consultant in March 1999 for a cost estimate of moving her belongings from Mason City, Nebraska, to Montana. Joy told the consultant that she wanted to move in June. But Joy did not hire the company. Joy arrived at Webb's residence in Montana on September 1.

Joy established a post office box in Montana. The record contains a mail forwarding change-of-address form that Joy filed on September 1, 1999, with the postal service. Joy checked on the form that her change of address was temporary and listed April 1, 2000, as the date to discontinue forwarding her mail.

On September 9, 1999, Joy obtained a Montana driver's license, using the Montana post office box as her address. Joy opened a bank account in Montana in 1999, but she had also opened accounts there in 1992 or 1993. She also jointly licensed and insured a vehicle with Webb in Montana. According to Webb, Joy intended to stay in Montana. The record contains a photocopy of an envelope from the Social Security Administration addressed to Joy at her Montana address. The record does not reflect what was in the envelope.

In August 1999, Joy was diagnosed with cancer and was later hospitalized in Montana for treatment. Webb testified that Joy instructed her not to contact family members about the hospital stay. Joy died and was buried in Montana. Webb testified that in accordance with Joy's request, she informed the family of Joy's death after the burial by calling Terry's oldest son.

Terry testified that before Joy went to Montana, Joy was living alone in her home in Mason City, Nebraska, because after Joy and Thomas separated, Thomas had moved into Terry's home. Terry stated that Joy had previously taken long visits to Montana to see Webb and estimated the visits lasted about a

month. According to Terry, there was no initial tension among family members about the pending divorce, but that some tension later occurred.

Joy never told Terry that she intended to relocate permanently to Montana. Instead, Terry stated that during an August court hearing about the divorce, Webb stated that Joy was going to Montana to receive medical treatment. After Joy went to Montana, Terry called the hospitals there trying to locate her, but was unsuccessful.

Staci Owens, Terry's daughter, testified that she had a good relationship with Joy and stated that if Joy was going to permanently move to Montana, she would have told her. According to Staci, Joy did not tell her she planned to move to Montana. Staci stated that in the past, Joy would not talk to her in front of Webb.

After Joy's death, Terry and Thomas gained access to her house. The house was not for sale or rent, and the utilities were turned on. The record contains photographs of the home. In the photographs, the house is completely furnished with personal items displayed. There were live plants in the home and food left in the cupboards and freezer. The closets contained linens and personal belongings.

Joan Cox, a neighbor of Joy's in Mason City, testified that Joy asked her to watch the house while she was in Montana. Cox watered the plants and made sure the electricity was on. Someone else had been hired to mow the lawn. When Joy left for Montana, she said that she would be back in October for a hearing. She did not say whether she would return to Montana after that. In October, Cox was told that Joy was in the hospital and could not return for the hearing.

The court stated that the documentary evidence was contradictory because, while Joy had obtained a Montana driver's license, she also filed a form with the postal service stating that her mail forwarding would be temporary. Because the documentary evidence was in conflict, the court relied on the credibility of the witnesses and other evidence. The court then found that Joy's domicile was in Nebraska at the time of her death. Webb's motion for a new trial was overruled, and she appeals.

ASSIGNMENT OF ERROR

Webb assigns that the county court erred by determining that Joy's domicile was in Nebraska instead of Montana.

STANDARD OF REVIEW

[1] In a bench trial of a law action, a trial court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous. *In re Estate of Krumwiede*, 264 Neb. 378, 647 N.W.2d 625 (2002).

ANALYSIS

Webb contends that the court erred in its factual findings. Webb relies on Joy's presence in Montana at the time of her death and that she had registered a vehicle there. In particular, Webb emphasizes that Joy obtained a Montana driver's license and received mail from the Social Security Administration at her Montana address. Webb also disagrees with the court's determinations about the credibility of the witnesses. Thomas, however, counters that the evidence was contradictory about Joy's intention to move and argues that the court correctly considered the credibility of the witnesses.

[2,3] Although there are various statutory procedures relating to the determination of domicile, the probate statutes do not provide a definition of domicile. See, e.g., Neb. Rev. Stat. § 30-2411 (Reissue 1995). We have said that "[t]he term 'domicile' is difficult of accurate definition, and it has been stated that the concept cannot be successfully defined so as to embrace all its phases. Its meaning, in each instance, depends upon the connection in which it is used.'" *In re Estate of Meyers*, 137 Neb. 60, 64, 288 N.W. 35, 37 (1939). It is universally held, however, that to acquire a domicile by choice, there must be both (1) residence through bodily presence in the new locality and (2) an intention to remain there. See, *Huffman v. Huffman*, 232 Neb. 742, 441 N.W.2d 899 (1989); *In re Estate of Meyers*, *supra*. Consequently, domicile is obtained only through a person's physical presence accompanied by the present intention to remain indefinitely at a location or by the present intention to make a location the person's permanent or fixed home. *Huffman v. Huffman*, *supra*.

[4,5] We have stated that to change domicile, there must be an intention to abandon the old domicile. *In re Estate of Meyers, supra*. In addition, because the intent of a person is not readily susceptible of analysis, all of the surrounding circumstances and the conduct of the person must be taken into consideration to determine his or her domicile. *Id.*

In *In re Estate of Meyers*, the decedent owned a ranch in Arthur County, but had been living in Omaha, Douglas County. He was listed in the Omaha city directory and maintained a bank account in Omaha. There was evidence that he changed his residence to Omaha to benefit his health and obtain education for his daughter. But he also continued to maintain his business in Arthur County and was registered to vote there. The trial court determined that the decedent was domiciled in Arthur County.

On appeal, we stressed that the decedent was registered to vote in Arthur County and noted that all of the circumstances must be considered. We further stated that “[a] change of residence for the purpose of benefiting one’s health does not usually effect a change of domicile. Such a change is looked upon as temporary merely, even though the actual time spent in the new residence may be long.” 137 Neb. at 67, 288 N.W. at 38.

Here, the court recognized evidence indicating that Joy may have intended to change her domicile to Montana. But the court also considered conflicting evidence. Although Joy obtained a Montana driver’s license and registered a vehicle in Montana, she also listed her move as temporary on a form she filled out with the postal service. The record also contains photographs showing that Joy left a substantial amount of her belongings at her home in Nebraska. Although Webb testified that Joy intended to permanently relocate to Montana, others testified that Joy would have told them if that were the case. The record also allows the court to infer that Joy went to Montana to receive medical care. Thus, there was conflicting evidence about Joy’s intent to change her domicile. In particular, there was evidence that she did not abandon her Nebraska domicile.

The court could reasonably infer that Joy traveled to Montana to receive long-term medical care but did not intend to permanently change her domicile. Webb argues, however, that the court’s determinations about the credibility of the evidence and

the witnesses were in error. But the credibility of witnesses and the weight to be given their testimony are for the trier of fact. *In re Application of Jantzen*, 245 Neb. 81, 511 N.W.2d 504 (1994). The county court's decision is not clearly erroneous. Accordingly, we affirm.

AFFIRMED.

JAMES JOHNSON, APPELLEE, v.

MIKE KENNEY, APPELLANT.

654 N.W.2d 191

Filed December 20, 2002. No. S-02-202.

1. **Statutes: Appeal and Error.** Interpretation of a statute presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **Statutes.** A statute is open for construction only when the language used requires interpretation or may reasonably be considered ambiguous.
3. _____. A statute is ambiguous when the language used cannot be adequately understood either from the plain meaning of the statute or when considered in *pari materia* with any related statutes.
4. _____. In construing a statute, a court must look to the statute's purpose and give the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.
5. **Statutes: Legislature: Intent.** In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
6. **Statutes: Legislature: Intent: Presumptions.** If, in a subsequent enactment on the same or similar subject, the Legislature uses different terms in the same connection, a court interpreting the subsequent enactment must presume that the Legislature intended a change in the law.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Reversed and remanded with directions to dismiss.

Don Stenberg, Attorney General, and Linda L. Willard for appellant.

Stephanie J. Garner Kotik, of Kleveland Law Offices, for appellee, and, on brief, James Johnson, pro se.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, McCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

NATURE OF CASE

James Johnson pled guilty to charges of delivery of a controlled substance and being a habitual criminal, and he was sentenced to 10 years' imprisonment. Johnson subsequently filed a petition seeking habeas corpus relief, alleging that pursuant to Neb. Rev. Stat. § 83-1,107(1) (Reissue 1994), he was entitled to have his sentence reduced by 6 months for each year of the sentence and that as a result of not receiving such sentence reduction, he was being wrongfully held. (Although § 83-1,107 has subsequently been amended, all references in this opinion are to Reissue 1994.) The district court for Lancaster County found that Johnson was being detained without legal authority and ordered that he be discharged from the custody of the Department of Correctional Services (Department). Mike Kenney, warden of the Nebraska State Penitentiary, appeals.

SCOPE OF REVIEW

[1] Interpretation of a statute presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *State v. Mather*, 264 Neb. 182, 646 N.W.2d 605 (2002).

FACTS

On September 16, 1996, Johnson pled guilty to charges of delivery of a controlled substance and being a habitual criminal. Thereafter, he was sentenced to a term of 10 years' imprisonment with credit for 243 days previously served.

On March 12, 2001, Johnson filed a pro se petition for writ of habeas corpus, seeking relief under Neb. Rev. Stat. § 29-2801 et seq. (Reissue 1995). Johnson alleged that pursuant to Nebraska's "good time statute," § 83-1,107(1), he was entitled to have his sentence reduced by 6 months for each year of the sentence, and that Kenney had failed to give him that credit. Johnson claimed that as a result of Kenney's failure to give Johnson good time credit, he was being wrongfully held by the Department.

Johnson was sentenced pursuant to Neb. Rev. Stat. § 29-2221(1) (Reissue 1995), which requires a mandatory minimum term of 10 years in prison for a habitual criminal conviction. Throughout these proceedings, Kenney has maintained that good time credit required by § 83-1,107(1) does not apply to a mandatory minimum sentence imposed under § 29-2221(1).

The trial court found that Johnson was entitled to receive good time credit of 6 months for each year of the sentence imposed. The court concluded that with a proper application of good time credit, the maximum portion of Johnson's sentence should have been reduced to 5 years. Finding that no evidence had been presented to establish that Johnson had lost any of his good time credit, the court determined that Johnson was being detained without legal authority and ordered that he be discharged. Kenney filed a timely notice of appeal, and we granted Johnson's petition to bypass.

ASSIGNMENT OF ERROR

Kenney asserts, restated, that the trial court erred in finding that good time credit applies to mandatory minimum sentences imposed on habitual criminals under § 29-2221(1).

ANALYSIS

The issue presented is one of statutory interpretation: whether the good time credit set forth in § 83-1,107(1) applies to the mandatory minimum sentence imposed upon Johnson pursuant to § 29-2221(1). We first set forth the relevant portions of each statute.

Before it was amended by 1995 Neb. Laws, L.B. 371, § 29-2221 provided that the minimum sentence imposed on a person found to be a habitual criminal was a term of not less than 10 years. See § 29-2221 (Cum. Supp. 1994). As amended by L.B. 371, § 29-2221(1) provides that a habitual criminal "shall be punished by imprisonment . . . for a mandatory minimum term of ten years and a maximum term of not more than sixty years." L.B. 371 became operative on September 9, 1995, and is applicable to Johnson's case.

The relevant version of § 83-1,107 provides:

- (1) The chief executive officer of a facility shall reduce the term of a committed offender by six months for each

year of the offender's term and pro rata for any part thereof which is less than a year. The total of all such reductions shall be credited from the date of sentence, which shall include any term of confinement prior to sentence and commitment as provided pursuant to section 83-1,106, and shall be deducted:

(a) From the minimum term, to determine the date of eligibility for release on parole; and

(b) From the maximum term, to determine the date when discharge from the custody of the state becomes mandatory.

In granting Johnson habeas corpus relief, the trial court stated it was clear that § 29-2221(1) required a sentencing court in every case to impose a mandatory minimum sentence of 10 years. It noted, however, that such a requirement did not answer the question of whether Johnson, who received a straight sentence of 10 years, which represented both the mandatory minimum and the maximum sentence, was entitled to receive good time credit against his sentence.

The trial court stated that although the imposition of a mandatory minimum sentence affects a person's eligibility for probation and parole, § 83-1,107 does not address the effect imposition of a mandatory minimum sentence has on the application of good time credit to the maximum portion of the sentence. In essence, the court concluded that § 83-1,107 does not specifically exclude application of good time to the maximum portion of the sentence when a mandatory minimum sentence has been imposed. Finding no ambiguities in § 83-1,107, the court stated there was no need to resort to judicial interpretation nor any need to look to the legislative intent.

[2,3] We disagree with the trial court's finding that § 83-1,107 is not ambiguous. A statute is open for construction only when the language used requires interpretation or may reasonably be considered ambiguous. *State v. Hochstein and Anderson*, 262 Neb. 311, 632 N.W.2d 273 (2001). A statute is ambiguous when the language used cannot be adequately understood either from the plain meaning of the statute or when considered in *pari materia* with any related statutes. *Premium Farms v. County of Holt*, 263 Neb. 415, 640 N.W.2d 633 (2002). It is undisputed that a

habitual criminal sentenced under § 29-2221 may not be released on parole until the individual has served the mandatory minimum sentence of 10 years. The fact that § 83-1,107 does not address whether good time may be applied to the maximum term of the sentence when the mandatory minimum and the maximum term are the same number of years gives rise to the ambiguity.

When the relevant statutes are considered in *pari materia*, the intent of habitual criminal sentencing is thwarted if good time credit is applied to the maximum term of the sentence before the mandatory minimum sentence has been served. The minimum portion of the sentence would have no meaning.

In 1992, the Legislature passed L.B. 816, which made significant changes to the law regarding good time credit for criminal offenders under § 83-1,107. In explaining one of the purposes of the changes, the introducer, Senator Ernie Chambers, stated:

The other significant effects of this bill is [sic] that no one will become eligible for parole after their mandatory discharge date. . . . Under the current law, a person can reach a date when they must be discharged before they are even eligible to be considered for parole. Since they must mandatorily be discharged before the Parole Board can even consider their case, there is no way for there to be Parole Board supervision.

Floor Debate, 92d Leg., 2d Sess. 7678 (Jan. 14, 1992).

Under the trial court's interpretation, the application of good time credit to the maximum portion of the sentence would result in a mandatory discharge before Johnson was eligible for parole under the minimum portion of the sentence. Johnson's maximum sentence and mandatory minimum sentence are both 10 years. Although he could not be released on parole, Johnson would receive a mandatory discharge from custody after only 5 years if good time reductions were applied to the maximum portion of the sentence.

Section 29-2221(1) requires that a habitual criminal "shall be punished by imprisonment . . . for a mandatory minimum term of ten years." It is clear the Legislature intended that imposition of a mandatory minimum sentence would result in a person's not being eligible for parole until the mandatory minimum sentence had been served. It would not serve the legislative intent if a

defendant could be mandatorily discharged before being eligible for parole.

[4,5] The language of § 83-1,107 cannot be adequately understood when considered in *pari materia* with related statutes. See *Premium Farms v. County of Holt*, 263 Neb. 415, 640 N.W.2d 633 (2002). In construing a statute, a court must look to the statute's purpose and give the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it. *State v. Portsche*, 261 Neb. 160, 622 N.W.2d 582 (2001). In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *State v. Baker*, 264 Neb. 867, 652 N.W.2d 612 (2002).

[6] Prior to its amendment, § 29-2221 provided that the sentence for a habitual criminal would be not less than 10 years. Section 29-2221 was subsequently amended to state that the sentence would be a mandatory minimum term of 10 years. If, in a subsequent enactment on the same or similar subject, the Legislature uses different terms in the same connection, a court interpreting the subsequent enactment must presume that the Legislature intended a change in the law. *State v. Portsche*, 258 Neb. 926, 606 N.W.2d 794 (2000).

Therefore, presuming that the Legislature intended a change in § 29-2221, we look to the legislative history concerning L.B. 371 in order to determine the Legislature's intent. The "Summary of L.B. 371 Referenced to the Judiciary Committee," which accompanied the Introducer's Statement of Intent, provided: "Habitual Criminal Sentencing . . . No person sentenced to a mandatory term under these statutes would be eligible for probation or reductions for 'good time.'" Judiciary Committee Hearing, 94th Leg., 1st Sess. (Feb. 8, 1995). The floor debate concerning L.B. 371 also supports this position.

From our review of the legislative history, we conclude the Legislature did not intend that good time credit under § 83-1,107(1) would apply to reduce mandatory minimum sentences imposed on habitual criminals under § 29-2221. Interpretation of a statute presents a question of law, in connection with which an appellate court has an obligation to

reach an independent conclusion irrespective of the decision made by the court below. *State v. Mather*, 264 Neb. 182, 646 N.W.2d 605 (2002).

CONCLUSION

The trial court erred in finding that good time credit under § 83-1,107(1) applies to mandatory minimum sentences imposed on habitual criminals pursuant to § 29-2221(1). The judgment of the trial court is reversed, and the cause is remanded with directions to dismiss Johnson's petition for writ of habeas corpus.

REVERSED AND REMANDED WITH
DIRECTIONS TO DISMISS.

IN RE INTEREST OF PHYLLISA B., A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, v. SAMUEL B., APPELLANT.

654 N.W.2d 738

Filed December 20, 2002. No. S-02-322.

1. **Juvenile Courts: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and the appellate court is required to reach a conclusion independent of the juvenile court's findings; however, when the evidence is in conflict, the appellate court will consider and give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.
2. **Parental Rights: Proof.** Before parental rights may be terminated, the evidence must clearly and convincingly establish the existence of one or more of the statutory grounds permitting termination and that termination is in the juvenile's best interests.
3. **Constitutional Law: Appeal and Error.** An appellate court will not consider a constitutional question on appeal that was not raised and properly presented for disposition by the trial court.
4. **Trial: Waiver: Appeal and Error.** Failure to make a timely objection waives the right to assert prejudicial error on appeal.
5. **Parental Rights: Evidence: Proof.** In order to terminate parental rights, the State must prove by clear and convincing evidence that one of the statutory grounds enumerated in Neb. Rev. Stat. § 43-292 (Reissue 1998) exists and that termination is in the child's best interests.
6. **Parental Rights: Final Orders: Appeal and Error.** An adjudication order is a final, appealable order.
7. **Juvenile Courts: Parental Rights: Jurisdiction: Appeal and Error.** In the absence of a direct appeal from an adjudication order, a parent may not question the existence of facts upon which the juvenile court asserted jurisdiction.
8. **Parental Rights.** Children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity.

Appeal from the Separate Juvenile Court of Douglas County:
DOUGLAS F. JOHNSON, Judge. Affirmed.

Ann C. Mangiameli and Kurt Goudy, Senior Certified Law Student, of Nebraska Legal Services, Inc., for appellant.

Thomas K. Harmon, Special Prosecutor, of Respeliers and Harmon, P.C., for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, McCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

The separate juvenile court of Douglas County terminated the parental rights of Samuel B. to his minor child Phyllisa B. pursuant to Neb. Rev. Stat. § 43-292(2), (6), and (7) (Reissue 1998). Samuel appeals the termination of his parental rights. We affirm.

STATEMENT OF FACTS

Samuel and Phyllis B. are the natural parents of Phyllisa, born on September 19, 1991. On or about October 21, 1998, Phyllisa was removed from her parents' care and placed in protective custody with the Nebraska Department of Health and Human Services (DHHS) by the Omaha Police Department due to allegations of an unsafe home environment. Specifically, Phyllisa had reported, in response to her elementary school teacher's inquiry as to why Phyllisa was falling asleep in class, that her father would come into her room late at night and "‘stick something in her mouth.’" After school officials called the police department to report Phyllisa's statement, Phyllisa told the investigating police officer that "her father came into her room and laid on top of her and 'humped her.'" Phyllisa also later reported that her brother, who is approximately 2 years older than Phyllisa, had sexual contact with her. Juvenile court proceedings were filed on October 21, 1998, and on the same date, the juvenile court ordered Phyllisa to be placed in DHHS' custody. She has remained in foster care in DHHS' custody continuously since that date.

In count II of its second amended adjudication petition filed on December 17, 1998, the State alleged as follows:

A. On or about October 20, 1998, [Phyllisa] disclosed that she was being subjected to inappropriate sexual contact by Samuel [B.]

B. Samuel [B.] continues to reside at the family residence.

C. Samuel [B.] has a past conviction for sexual assault on a child.

D. Samuel [B.]'s use of alcohol and/or controlled substances places [Phyllisa] at risk for harm.

E. Due to the above allegations, [Phyllisa] is at risk for harm.

At the adjudication hearing, following the testimony of several witnesses, including Phyllisa's elementary school teacher and a school counselor, Samuel pled no contest to paragraphs A, B, and E of count II. Near the end of the adjudication hearing, the State dismissed paragraphs C and D of count II.

In an order filed February 26, 1999, the juvenile court determined that Phyllisa was a child as described in Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1998), being under the age of 18 years and lacking proper parental care by reason of the faults or habits of Samuel. In its adjudication order, the juvenile court found that on or about October 20, 1998, Phyllisa disclosed that she was subjected to inappropriate sexual contact by Samuel, that Samuel continues to reside at the family residence, and that due to these allegations, Phyllisa is at risk for harm. Samuel did not appeal the juvenile court's adjudication order. In an additional order filed March 4, 1999, the juvenile court also determined that Phyllisa was a child as described in § 43-247(3)(a) by reason of the faults or habits of Phyllis. The parental rights of Phyllis are not at issue in this appeal.

A disposition hearing was held on July 7, 1999, followed by review hearings on January 25 and August 30, 2000, and February 8 and August 3, 2001. In orders entered following each of these hearings, the juvenile court found that the permanency objective was reunification, with a concurrent plan of adoption. In order to meet the reunification plan, Samuel was ordered, inter alia, (1) to have no contact or communication with Phyllisa pending further order of the court, (2) to participate in and successfully complete individual and family therapy to address the

sexual abuse of Phyllisa, and (3) to submit to random drug screens. In particular, in its order entered following the January 25, 2000, review hearing, the juvenile court ordered Samuel to “obtain meaningful therapy and rehabilitation to correct the findings of the adjudication that places [Phyllisa] and [Samuel] under the jurisdiction of the Court.” Similar language was contained in subsequent orders. Comparable orders were entered as to Phyllis.

On June 7, 2001, the State filed a “Motion for Termination of Parental Rights and Notice of Hearing.” The motion sought termination of both Samuel’s and Phyllis’ parental rights under § 43-292(2), (6), and (7). The motion also asserted that termination of parental rights was in Phyllisa’s best interests.

Section 43-292(2) requires a finding that the parent has substantially and continuously or repeatedly neglected or refused to give the juvenile necessary parental care and protection. Section 43-292(6) requires a finding that following a determination that the juvenile is one as described in § 43-247(3)(a), reasonable efforts to preserve and unify the family under the direction of the court have failed to correct the conditions leading to the determination. Section 43-292(7) requires a finding that the juvenile has been in out-of-home placement for 15 or more of the most recent 22 months.

On February 19, 2002, the State’s motion for termination came on for hearing before the juvenile court. In a written order filed February 21, the juvenile court found that the State had proved by clear and convincing evidence the grounds for termination set forth in § 43-292(2), (6), and (7). The juvenile court further found that it was in Phyllisa’s best interests that Samuel’s and Phyllis’ parental rights be terminated. Accordingly, the juvenile court terminated Samuel’s and Phyllis’ parental rights to Phyllisa. Samuel appeals.

ASSIGNMENTS OF ERROR

On appeal, Samuel alleges three assignments of error. Samuel alleges, renumbered and restated, that the juvenile court erred (1) in granting the State’s motion to terminate Samuel’s parental rights in violation of his Fifth Amendment privilege against self-incrimination, (2) in finding that the State proved by clear

and convincing evidence under § 43-292(2) that Samuel had substantially and continuously or repeatedly neglected and refused to give Phyllisa necessary parental care and protection, and (3) in finding that the State proved by clear and convincing evidence under § 43-292(6) that reasonable efforts had failed to correct the conditions leading to the adjudication of Phyllisa. We note that although Samuel raises a constitutional objection on appeal, he does not dispute the juvenile court's finding that Phyllisa had been in out-of-home placement for "over three years," which fact would serve as a basis for termination under § 43-292(7).

STANDARDS OF REVIEW

[1,2] Juvenile cases are reviewed de novo on the record, and the appellate court is required to reach a conclusion independent of the juvenile court's findings; however, when the evidence is in conflict, the appellate court will consider and give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other. *In re Interest of Sabrina K.*, 262 Neb. 871, 635 N.W.2d 727 (2001). Before parental rights may be terminated, the evidence must clearly and convincingly establish the existence of one or more of the statutory grounds permitting termination and that termination is in the juvenile's best interests. *In re Interest of Lisa W. & Samantha W.*, 258 Neb. 914, 606 N.W.2d 804 (2000).

ANALYSIS

Constitutional Objection.

On appeal, Samuel claims that compliance with various plan provisions would require that he admit to sexual contact with Phyllisa and that such terms would violate his right to exercise his Fifth Amendment privilege against self-incrimination. Samuel suggests on appeal that Phyllisa was continued in out-of-home placement due, in part, to Samuel's refusal to admit to sexual contact with Phyllisa. In this regard, we note that the record shows that the juvenile court's orders with regard to the reunification plan to obtain "meaningful therapy" employed the language of *In re Interest of Clifford M. et al.*, 6 Neb. App. 754, 577 N.W.2d 547 (1998), and that the termination order of February 21, 2002, states that "the parents still have not sufficiently progressed rehabilitatively."

[3,4] The record provided on appeal does not reflect that Samuel raised his constitutional objection in the proceedings before the juvenile court. Generally, an appellate court will not consider a constitutional question on appeal that was not raised and properly presented for disposition by the trial court. *In re Interest of Lisa W. & Samantha W.*, *supra*; *In re Interest of Rachael M. & Sherry M.*, 258 Neb. 250, 603 N.W.2d 10 (1999). This is because a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition. *In re Interest of Lisa W. & Samantha W.*, *supra*. We have also stated that “[f]ailure to make a timely objection waives the right to assert prejudicial error on appeal.” *In re Interest of Kassara M.*, 258 Neb. 90, 94, 601 N.W.2d 917, 922 (1999). Accordingly, we do not address Samuel’s constitutional objection presented for the first time on appeal concerning his Fifth Amendment privilege against self-incrimination.

Termination of Parental Rights Under § 43-292(7).

[5] The juvenile court found that all three of the grounds for termination alleged in the State’s motion, § 43-292(2), (6), and (7), were proved by the State. In order to terminate parental rights, the State must prove by clear and convincing evidence that one of the statutory grounds enumerated in § 43-292 exists and that termination is in the child’s best interests. *In re Interest of DeWayne G. & Devon G.*, 263 Neb. 43, 638 N.W.2d 510 (2002); *In re Interest of Clifford M. et al.*, 261 Neb. 862, 626 N.W.2d 549 (2001). Our de novo review of the record shows that termination of Samuel’s parental rights was sufficiently demonstrated pursuant to § 43-292(7), and we affirm on the basis of § 43-292(7). Accordingly, we need not consider Samuel’s assigned errors relating to the sufficiency of evidence under other statutory provisions identified by the juvenile court as grounds for termination of his parental rights. See, *In re Interest of DeWayne G. & Devon G.*, *supra*; *In re Interest of Clifford M. et al.*, *supra*; *In re Interest of Lisa W. & Samantha W.*, 258 Neb. 914, 606 N.W.2d 804 (2000).

Section 43-292(7) requires that the child in question be in out-of-home placement for 15 or more of the most recent 22 months to support termination based on § 43-292(7). The record reflects that at the time of the termination hearing, Phyllisa had

been in continuous foster care for approximately 40 months. The only remaining issue is whether termination of Samuel's parental rights is in Phyllisa's best interests. The record amply demonstrates that termination of Samuel's parental rights is in Phyllisa's best interests.

[6,7] On February 26, 1999, the juvenile court determined that Phyllisa was a child within the meaning of § 43-247(3)(a) based on the court's factual findings that Phyllisa had disclosed that she was subjected to inappropriate sexual contact by Samuel and that Samuel still lived in the home. As a result of these findings, the juvenile court determined that Phyllisa was at risk, adjudicated Phyllisa, and ordered that Phyllisa should remain in the care and custody of DHHS. An adjudication order is a final, appealable order. See *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997). The record reflects that Samuel did not appeal the juvenile court's adjudication order indicating that Phyllisa was a child at risk due to the fact Phyllisa had claimed that Samuel had subjected her to inappropriate sexual contact and that Samuel lived in the home. In the absence of a direct appeal from an adjudication order, a parent may not question the existence of facts upon which the juvenile court asserted jurisdiction. *In re Interest of Brook P. et al.*, 10 Neb. App. 577, 634 N.W.2d 290 (2001).

At the February 19, 2002, termination hearing, the State called six witnesses to testify: Tina Flowers, Phyllisa's therapist; Cheryl Felix, Phyllis' therapist; Kathie McDaniel, Samuel's therapist; Letitia Kopp, Phyllisa's foster care specialist; and Nicole Rogert and Jennifer Bivens, DHHS child protection and safety workers assigned to Phyllisa's case. The State also introduced into evidence exhibit 30, which was composed of certified copies of the petitions and orders in the case. Phyllis testified on her own behalf. Samuel did not testify or call any witnesses or introduce any exhibits into evidence.

During the termination hearing, Flowers testified as to Phyllisa's conduct that supported Phyllisa's claim that she had been subjected to inappropriate sexual contact by Samuel, including that Phyllisa wet her bed nightly, had "ongoing nightmares regarding sucking men's penises [and] having sexual relations with men," and masturbated publicly. Flowers testified that

she could not explain this conduct as signifying anything other than that Phyllisa had been sexually molested. Although Flowers testified that Phyllisa had subsequently recanted her earlier statement that she had been subjected to inappropriate sexual contact by Samuel, Flowers responded “[y]es” when asked if it was normal for children who initially tell the truth regarding allegations of sexual molestation to later recant those statements. According to Flowers, Phyllisa’s recantation was normal “especially since it’s a parental figure [and] she wants to go home.”

On appeal, Samuel disputes that the inappropriate contact occurred. The record shows that Samuel has not participated in meaningful therapy and rehabilitation relating to the molestation issue. The record further reflects that Samuel remains in the family home. Finally, the record reflects that Kopp testified that it would not be in Phyllisa’s best interests to be returned to her family home and that Flowers and Bivens both testified that termination of Samuel’s parental rights was in Phyllisa’s best interests.

[8] We have stated that children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity. *In re Interest of DeWayne G. & Devon G.*, 263 Neb. 43, 638 N.W.2d 510 (2002); *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997). Based upon the evidence, we conclude that the record clearly and convincingly shows that at the time of the termination hearing, Phyllisa had been in out-of-home placement for 15 or more of the most recent 22 months and that termination of Samuel’s parental rights was in Phyllisa’s best interests. Accordingly, we affirm the juvenile court’s order terminating Samuel’s parental rights as to Phyllisa pursuant to § 43-292(7).

CONCLUSION

Based upon our de novo review of the record, we conclude that there is clear and convincing evidence that Samuel’s parental rights should be terminated pursuant to § 43-292(7) and that such termination is in Phyllisa’s best interests. Accordingly, the judgment of the juvenile court is affirmed.

AFFIRMED.

ANDERSON EXCAVATING & WRECKING COMPANY, APPELLANT, v.
SANITARY IMPROVEMENT DISTRICT NO. 177, APPELLEE.
654 N.W.2d 376

Filed December 27, 2002. No. S-01-1178.

1. **Breach of Contract: Damages: Appeal and Error.** A suit for damages arising from breach of a contract presents an action at law. In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong.
2. **Contracts: Damages.** A party's "reliance interest" is a measure of damages in a contract action.
3. **Breach of Contract: Damages: Proof: Words and Phrases.** Reliance damages are defined as an alternative measure of damages under which the injured party has a right to damages based on his or her reliance interest, including expenditures made in preparation for performance or in performance, less any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed.
4. **Breach of Contract.** The question whether there has been repudiation or whether repudiation was justified is a question of fact.
5. **Breach of Contract: Damages: Words and Phrases.** A repudiation is (1) a statement by the obligor to the obligee indicating that he or she will commit a breach that would of itself give the obligee a claim for damages for total breach or (2) a voluntary affirmative act which renders the obligor either unable or apparently unable to perform without such a breach.
6. **Breach of Contract.** Where performances are to be exchanged under an exchange of promises, one party's repudiation of a duty to render performance discharges the other party's remaining duties to render performance.
7. _____. Where a party's repudiation contributes materially to the nonoccurrence of a condition of one of his or her duties, the nonoccurrence is excused.
8. _____. In order to constitute a repudiation, a party's language must be sufficiently positive to be reasonably interpreted to mean that the party will not or cannot perform.
9. _____. Mere expression of doubt as to a willingness or ability to perform is not enough to constitute a repudiation, but language that under a fair reading amounts to a statement of intention not to perform except on conditions which go beyond the contract constitutes a repudiation.
10. _____. A repudiation can be nullified by a retraction of the statement before the injured party materially changes his or her position in reliance on the repudiation or indicates to the other party that he or she considers the repudiation to be final.
11. _____. To be effective, a retraction of a repudiation must be clear and unequivocal and it may not impose new conditions not in accord with the original contract.
12. _____. The injured party does not change the effect of a repudiation by urging the repudiator to perform in spite of his or her repudiation or to retract his or her repudiation.

Appeal from the District Court for Douglas County: W. MARK ASHFORD, Judge. Affirmed.

James D. Sherrets, Theodore R. Boecker, Jr., and Scott D. Jochim, of Sherrets & Boecker, L.L.C., for appellant.

Patrick G. Vipond and Robert A. Mooney, of Lamson, Dugan & Murray, L.L.P., and Donald R. Overholt for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, McCORMACK, and MILLER-LEMAN, JJ.

CONNOLLY, J.

Anderson Excavating & Wrecking Company (Anderson) appeals from an order of the district court finding that Anderson had repudiated a contract it entered into with Sanitary Improvement District No. 177 (SID) and determining that Anderson was not entitled to damages. We affirm because the court was not clearly wrong when it found that Anderson had repudiated the contract.

BACKGROUND

In 1992, the SID sought bids for a seawall construction and dredging project at Riverside Lakes, which consists of residential property and adjoining manmade lakes. The project involved erecting seawalls around three islands in a boating lake and dredging the lake to make it more uniform in depth. The plans for the project were designed by an engineering firm, Lamp, Rynearson & Associates, Inc. (Lamp). The plans called for the dredged material to be disposed of on the three islands.

After receiving bids, the SID split the project into two contracts and phases of work. Phase I of the project involved the construction of the seawalls and was awarded to Big River Construction. Anderson was awarded phase II of the project, which involved the dredging of the lake. Anderson was concerned before the contract was signed that the seawalls would not be able to hold the weight of the dredged material. Anderson entered into the contract, however, and obtained a performance bond and insurance. The "Special Conditions" portion of the contract documents between the SID and Anderson provided in part:

The CONTRACTOR shall excavate the existing lake by means of hydraulic dredge and shall dispose of the excavated material on the islands in the lake. . . .

...
The dredged material shall be distributed on the islands in a manner to provide a generally smooth mounded surface capable of providing a seed bed. Trees do not have to be removed and lower vegetation can be buried in the fill. . . . Placement of dredged materials shall be done in such a manner as to provide a safe ledge at the seawall. Excess material surcharging the seawall shall be promptly removed and all damage to the seawall repaired by dredging contractor.

The CONTRACTOR shall report to the ENGINEER the location and extent of all obstructions to dredging encountered, at which time a change order will be prepared for removal thereof if additional work is determined to be advisable. . . . Obstructions shall be considered materials exceeding five (5) inches in diameter.

The "Agreement" portion of the contract documents provided: The CONTRACTOR for the Seawall Construction shall commence work on the seawall within thirty (30) days after Notice of Award and shall complete the seawall on one island within twenty (20) working days. All seawall construction shall be completed by April 30, 1993. The CONTRACTOR for the lake dredging shall commence operations immediately upon completion of the seawall on the first island and shall complete all dredging and seeding operations on or before May 28, 1993.

There were delays in the progress of Big River Construction's work. Thus, on April 16, 1993, Lamp issued a change order which modified the contract to read: "The CONTRACTOR for the lake dredging shall commence operation after September 7, 1993, and shall complete all dredging and seeding operations on or before May 1, 1994." The "Supplementary Conditions" portion of the contract documents provided that "[t]he Contract Times will commence to run on the day indicated in the Notice to Proceed. In no event will the Notice to Proceed be issued later than six months after the Bid opening."

The record shows that in the normal course of construction business, a "notice to proceed" is sent to a contractor to formally notify the contractor to commence work. Anderson was never sent

a “notice to proceed,” nor was it sent a notice that the contract had been terminated. Anderson also provided evidence that a notice to proceed is different from a change order. The SID, however, presented evidence that the change order fulfilled the notice-to-proceed requirement in the contract because it set a date fixing the date on which work would begin under the contract.

A dispute arose between Anderson and the SID about Anderson’s ability to place the dredged material on the islands. According to Steven Braithwaite, Anderson’s project manager, the islands were rounded on top and any material placed there would run off into the lake. Because the contract would hold Anderson liable for excess material surcharging the seawalls and for damage to the seawalls, Braithwaite was concerned about exposing Anderson to liability. According to Otto Ludewig, an engineer at Lamp, his firm’s opinion was that the islands needed a “little bit of work” to flatten them out and that the addition of silt fences would allow the dredged material to be placed on the islands.

Anderson presented evidence that residents of the lake had complained about the possibility of depositing the dredged material on the islands and that the SID was looking for other sites for the material. Braithwaite testified that unless the island issue was resolved, there was nothing Anderson could do.

On August 16, 1993, Braithwaite sent a letter to Joel Bard, an engineer from Lamp, stating that Anderson had been assured in a meeting which had occurred during the past winter that the islands would be “bowled out in the middle” before Anderson commenced phase II and that this work had not been done. Braithwaite wrote that “it is not the responsibility of the dredger to prepare the islands for dredging materials. It is only the responsibility of the dredger to place the materials on the islands.” The letter indicated that Anderson considered the problem to be an obstruction to dredging under the contract.

On August 17, 1993, Bard responded that the problem was not an obstruction under the contract. He further wrote that he agreed that bowling out the islands was one way to prepare the islands for disposal of the dredged material but also wrote that “[w]hile we and the [SID] were agreeing that you and Big River could make some agreement as to how to prepare the islands for

your convenience, neither Big River [n]or the [SID] was obligated to perform such work.”

A meeting was held on August 19, 1993, between Braithwaite, Bard, Ludewig, and a consultant of Anderson to discuss the problem. Three options were discussed at the meeting: (1) issuance of a change order to allow additional payment to Anderson, (2) termination of the contract without financial liability to either party, and (3) execution of the work by Anderson according to Anderson’s interpretation of the contract.

On August 24, 1993, Braithwaite wrote to Bard, stating:

To prepare the islands for placement of dredged materials will cost approximately \$27,000.00. If the S.I.D. is prepared to issue a Change Order to that effect Anderson will begin as agreed. However, if the S.I.D. is unwilling to issue the Change Order, then there appears to be only two other alternatives.

First, they could rebid the dredging portion of the contract, and include the areas left unaddressed such as the island preparation. In this case Anderson would be willing to relinquish all rights under this contract without any further expense to the S.I.D., provided that the performance and payment bonds are returned

The second alternative is less attractive in that it requires all parties to prepare for litigation and rely upon the judicial system for determination. This process is both very expensive and time consuming. However, should this become necessary, Anderson is also prepared to exercise this alternative.

After receiving the letter, Bard recommended that the SID accept the proposal to terminate the contract “[i]n view of the above disagreements and your desire to review the amount of dredging and possible alternate disposal sites” The SID did not terminate the contract. Anderson presented evidence that Lamp and the SID behaved as if there were a contract still in place after the August 24, 1993, letter was received. Bard stated that after August 1994, “the actual status of Anderson’s contract was sort of in a never-land.” Anderson never commenced work on the dredging project, and neither Lamp nor the SID demanded that work be commenced.

On December 20, 1996, Anderson brought suit against the SID alleging that (1) the SID refused to go forward with the contract or to sign a proposed change order to the contract about the responsibility for the preparation of the islands, (2) the SID failed to generate a notice to proceed for Anderson to begin work, (3) the SID abandoned and breached the contract, and (4) Anderson incurred expenses in preparing to begin work on the contract, including costs incurred for insurance and performance bonds. Anderson's petition alleged two causes of action: a breach of contract cause of action seeking lost profits, and a cause of action, labeled "Detrimental Reliance," seeking expenses for preparation for work on the project. The SID denied the allegations and alleged that Anderson had breached and abandoned the contract.

The SID moved for summary judgment. The district court granted the motion and dismissed Anderson's petition, and Anderson appealed. The Nebraska Court of Appeals, in an unpublished opinion, determined that there were genuine issues of material fact preventing summary judgment on the issue of Anderson's reliance on the contract and reversed, and remanded for further proceedings. See *Anderson Excavating v. SID No. 177*, No. A-98-1022, 2000 WL 559015 (Neb. App. May 2, 2000) (not designated for permanent publication). On remand, the SID moved for partial summary judgment on the breach of contract cause of action, arguing that the Court of Appeals' decision determined that there were issues of fact only on the "detrimental reliance" cause of action. The district court granted the motion.

After a bench trial, the court determined that Anderson had repudiated the contract when it sent the August 24, 1993, letter demanding a change order or that the project be rebid and threatening litigation. The court determined that the unilateral repudiation of the contract precluded any equitable claims for recovery or for breach of contract. The court dismissed the petition. Anderson's motion for a new trial was overruled. Anderson appeals.

ASSIGNMENTS OF ERROR

Anderson assigns, rephrased, that the district court erred by (1) failing to find that the SID was in breach of the contract by failing to issue a notice to proceed and by delaying Anderson's

performance of the contract; (2) failing to find that Anderson was entitled to equitable relief, including damages for expenses; and (3) finding that Anderson had repudiated or abandoned the contract.

STANDARD OF REVIEW

[1] A suit for damages arising from breach of a contract presents an action at law. In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. *Ruble v. Reich*, 259 Neb. 658, 611 N.W.2d 844 (2000).

ANALYSIS

WHETHER ACTION IS AT LAW OR IN EQUITY

Anderson contends that the court wrongly determined that it had repudiated the contract and was not entitled to equitable relief. Anderson argues that this is an equity action because it seeks to recover damages for "detrimental reliance." We disagree and determine that Anderson's claim is for breach of contract and is an action at law.

[2,3] A party's "reliance interest" is a measure of damages in a contract action. Restatement (Second) of Contracts § 349 at 124 (1981). Reliance damages are defined as an alternative measure of damages under which "the injured party has a right to damages based on his reliance interest, including expenditures made in preparation for performance or in performance, less any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed." *Id.* The Restatement does not treat "detrimental reliance" as a separate cause of action. Instead, it is a measure of damages for breach of contract.

Here, Anderson sought expenses for preparation of work on the project under the contract and contends that the SID breached the contract by failing to issue a notice to proceed. Thus, Anderson was seeking reliance damages for breach of contract which is an action at law. We note that the court tried the case as if it were an action in equity. Because Anderson's action was actually an action at law, however, we will not reverse the court's factual findings unless they are clearly wrong.

REPUDIATION

[4,5] Anderson contends that it did not repudiate the contract. The question whether there has been repudiation or whether repudiation was justified is a question of fact. *Chadd v. Midwest Franchise Corp.*, 226 Neb. 502, 412 N.W.2d 453 (1987). We have held that a repudiation is (1) a statement by the obligor to the obligee indicating that he or she will commit a breach that would of itself give the obligee a claim for damages for total breach or (2) a voluntary affirmative act which renders the obligor either unable or apparently unable to perform without such a breach. *Hooker and Heft v. Estate of Weinberger*, 203 Neb. 674, 279 N.W.2d 849 (1979); Restatement, *supra*, § 250.

[6-9] Where performances are to be exchanged under an exchange of promises, one party's repudiation of a duty to render performance discharges the other party's remaining duties to render performance. Restatement, *supra*, § 253(2). Also, where a party's repudiation contributes materially to the nonoccurrence of a condition of one of his or her duties, the nonoccurrence is excused. *Chadd v. Midwest Franchise Corp.*, *supra*; Restatement, *supra*, § 255.

In order to constitute a repudiation, a party's language must be sufficiently positive to be reasonably interpreted to mean that the party will not or cannot perform. Mere expression of doubt as to his willingness or ability to perform is not enough to constitute a repudiation

However, language that under a fair reading "amounts to a statement of intention not to perform except on conditions which go beyond the contract" constitutes a repudiation.

Restatement, *supra*, § 250, comment *b.* at 273. Accord Neb. U.C.C. § 2-610, comment 2 (Reissue 2001).

Here, Anderson sent a letter stating that it was facing additional expenses to prepare the seawalls. The letter then stated Anderson would perform if a change order was entered to provide for additional payment of \$27,000. The letter stated that if a change order could not be made, the two remaining options were to rebid the contract or have the dispute settled through legal action. A reasonable reading of the letter shows that Anderson would not perform the contract as originally agreed. Thus, it was

not clearly erroneous for the court to find that the letter was a repudiation of the contract.

Anderson argues that the court wrongly focused on only the August 24, 1993, letter and should have considered events that happened before and after the letter was sent. For example, Anderson contends that the SID continued to behave as if a contract existed after the letter was sent and that there was evidence that the parties were still attempting to find a solution to the problem.

[10-12] A repudiation can be nullified by a retraction of the statement before the injured party materially changes his or her position in reliance on the repudiation or indicates to the other party that he or she considers the repudiation to be final. See, *Gilmore v. Duderstadt*, 125 N.M. 330, 961 P.2d 175 (N.M. App. 1998); Restatement (Second) of Contracts § 256(1) (1981). But, to be effective, a retraction must be clear and unequivocal and it may not impose new conditions not in accord with the original contract. *Gilmore v. Duderstadt*, *supra*. The injured party does not change the effect of a repudiation by urging the repudiator to perform in spite of his or her repudiation or to retract his or her repudiation. See, *Cedar Point Apartments v. Cedar Point Inv. Corp.*, 693 F.2d 748 (8th Cir. 1982); Restatement, *supra*, § 257.

Anderson's arguments fail because Anderson never specifically retracted its repudiation. Further, any additional attempts by the SID to change the location for the placement of the dredged material did not change the fact that a repudiation occurred. When Anderson repudiated the contract, the SID was excused from performing the condition of issuing a notice to proceed and was excused from performing any of its contractual duties. Thus, the court was not clearly wrong when it determined that Anderson had repudiated the contract and could not recover reliance damages.

CONCLUSION

We determine that Anderson's claim for damages for detrimental reliance on the contract is an action at law for breach of contract. We further determine that the district court was not clearly wrong when it determined that Anderson had repudiated

the contract and could not recover reliance damages. Accordingly, we affirm.

AFFIRMED.

IN RE APPLICATION OF LINCOLN ELECTRIC SYSTEM.
LINCOLN ELECTRIC SYSTEM, LINCOLN, APPELLANT, V.
NEBRASKA PUBLIC SERVICE COMMISSION, APPELLEE,
AND NEBRASKA TELECOMMUNICATIONS ASSOCIATION
ET AL., INTERVENORS-APPELLEES.

655 N.W.2d 363

Filed January 10, 2003. No. S-01-286.

1. **Public Service Commission: Appeal and Error.** The appropriate standard of review for appeals from the Nebraska Public Service Commission is a review for errors appearing on the record. When reviewing an order for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
2. **Judgments: Appeal and Error.** Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.
3. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
4. **Moot Question: Words and Phrases.** A moot case is one which seeks to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive.
5. **Constitutional Law: Statutes.** Federal preemption arises from the Supremacy Clause of the U.S. Constitution and is the concept that state laws that conflict with federal law are invalid.
6. **Constitutional Law: States: Words and Phrases.** There are three varieties of preemption: express, implied, and conflict preemption.
7. ____: ____: _____. Express preemption arises when Congress has explicitly declared federal legislation to have a preemptive effect. It can also arise when a federal agency, acting within the scope of authority conferred upon it by Congress, has expressly declared an intent to preempt state law.
8. **Constitutional Law: States.** Under the Supremacy Clause of the U.S. Constitution, state courts have a concurrent duty to enforce federal law.
9. **Constitutional Law: Statutes: States.** By virtue of the Supremacy Clause of the U.S. Constitution, Neb. Rev. Stat. §§ 86-128(1)(b) and 86-575(2) (Cum. Supp. 2002) are preempted by federal law and are unconstitutional.
10. **Appeal and Error.** Errors that are assigned but not argued will not be addressed by an appellate court.

11. **Municipal Corporations.** A charter defining powers and duties is essential to the creation and existence of a municipal corporation.
12. **Municipal Corporations: Legislature: Ordinances.** A legislature's grant of powers to a municipality is often referred to as a "legislative charter." Legislative grants of power are strictly construed pursuant to what has become known as Dillon's rule, which provides a municipal corporation possesses and can exercise these powers only: (1) those granted in express terms; (2) those necessarily or fairly implied in, or incident to, the powers expressly granted; and (3) those essential to the declared objects and purposes of the municipality, not merely convenient, but indispensable.
13. **Municipal Corporations.** The purpose of a home rule charter is to render the city as nearly independent as possible from state interference. Legally, a home rule charter is simply another method of empowering a municipality to govern its own affairs.
14. _____. While a legislative charter emanates from the sovereign legislature, a home rule charter has as its basis a constitutional provision enacted by the sovereign people authorizing the electorate to empower municipalities with the authority to govern their own affairs.
15. _____. While legislative charters are always grants of power that are strictly construed, home rule or constitutional charters may be either grants of power or limitations of power.
16. _____. A home rule city may act in all matters necessary or incidental to its government, although municipal action will take precedence over conflicting state action only if the matter is one of strictly local concern.

Appeal from the Nebraska Public Service Commission.
Affirmed.

William F. Austin, of Erickson & Sederstrom, P.C., Douglas L. Curry, of Lincoln Electric System, and Mark J. Ayotte, of Briggs and Morgan, P.A., for appellant.

Jack L. Shultz and Gregory D. Barton, of Harding, Shultz & Downs, for intervenor-appellee Nebraska Telecommunications Association.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, McCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

This is an appeal of an order of the Nebraska Public Service Commission (Commission) dismissing an application for contract carrier permit authority filed by Lincoln Electric System (LES). LES appeals, arguing the Commission erred in determining that LES lacked legal authority to provide contract carrier telecommunications services.

I. PROCEDURAL HISTORY

LES is an operating division of the city of Lincoln, a Nebraska municipal corporation and political subdivision of the State of Nebraska. On October 4, 2000, LES filed an application and request for authority with the Commission, seeking a contract carrier permit authorizing LES to provide competitive access transport services. In its application, LES sought authority to operate as a switchless facilities-based provider of dedicated digital information transmission services over its fiber-optic network facilities to and from customer user points.

The application identifies LES as a citizen-owned electric utility serving a 190-square-mile area surrounding the city of Lincoln. It states that LES provides electrical service to approximately 111,000 metered customers and also engages in wholesale power and energy transactions, including buying from and selling to other regional public utilities. According to the application, LES owns and maintains extensive fiber-optic facilities located throughout its authorized electric service area, which are used to meet LES' telecommunications needs through the interconnection of its operations center, generation stations, and substations. LES sought contract carrier permit authority to allow it to fully utilize its existing fiber optic system for the benefit of the Lincoln area by making these facilities available on a non-exclusive basis to provide digital transmission to and from user points within its requested geographic service area, including services to other licensed telecommunications carriers as a provider of competitive access services.

LES stated in its application that its proposed telecommunications services would not make use of the local or interexchange public switched telephone network and that it expected the proposed service to be "used primarily by business customers and governmental entities to meet their telecommunications needs."

The Nebraska Telecommunications Association (NTA) formally intervened in the matter. On November 9, 2000, the NTA filed a motion for declaratory relief alleging that LES lacked the legal authority to perform for-hire telecommunications services or to hold a contract carrier permit to perform such services. A hearing on the motion was held on December 11, 2000. On January 9, 2001, the Commission entered an order concluding

that LES did not have legal authority to provide for-hire telecommunications services. The Commission reasoned that no statute gave LES the requisite authority and that Lincoln's home rule charter, strictly construed, contained no express grant of such authority. One concurring commissioner found that the city had the requisite authority pursuant to its home rule charter, but had not delegated such authority to LES. After its motion for rehearing was denied, LES filed this timely appeal.

II. ASSIGNMENTS OF ERROR

LES assigns that the Commission erred in (1) concluding that the charter of the city of Lincoln does not authorize the city to offer for-hire telecommunications services when such activity is not in contravention of any applicable constitutional or statutory provision; (2) applying a rule of strict construction, referred to as "Dillon's rule," to the limitation of powers charter under which the city of Lincoln currently operates and from which it derives its primary authority; (3) declaring that Neb. Rev. Stat. § 15-201 (Reissue 1997) does not permit the city of Lincoln to provide for-hire telecommunications services; and (4) concluding that the city of Lincoln does not have the inherent authority to make the efficient business judgment of offering its unused fiber-optic capacity for telecommunications purposes when it is engaged in the proprietary function of operating an electric utility.

III. STANDARD OF REVIEW

[1] The appropriate standard of review for appeals from the Nebraska Public Service Commission is a review for errors appearing on the record. *In re Proposed Amend. to Title 291*, 264 Neb. 298, 646 N.W.2d 650 (2002); *In re Application No. C-1889*, 264 Neb. 167, 647 N.W.2d 45 (2002). When reviewing an order for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *In re Application of Neb. Pub. Serv. Comm.*, 260 Neb. 780, 619 N.W.2d 809 (2000).

[2] Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court. *Id.*

[3] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law. *Douglas Cty. Bd. of Comrs. v. Civil Serv. Comm.*, 263 Neb. 544, 641 N.W.2d 55 (2002); *Gernstein v. Lake*, 259 Neb. 479, 610 N.W.2d 714 (2000).

IV. ANALYSIS

1. MOOTNESS AND PREEMPTION

The question of law presented by this appeal is whether the Commission erred in determining that LES lacked the legal authority to operate as a for-hire telecommunications carrier. During the pendency of this appeal, the Nebraska Legislature enacted 2001 Neb. Laws, L.B. 827. Certain sections of this bill, originally codified at Neb. Rev. Stat. §§ 75-604(5) and 86-2302(2) (Supp. 2001), became effective on September 1, 2001. These statutes provided that the Commission “shall not issue . . . a permit . . . to an agency or political subdivision of the state” and that “[n]o agency or political subdivision of the state shall provide telecommunications services for a fee . . . or be issued . . . a permit as a telecommunications contract carrier.” §§ 75-604(5) and 86-2302(2). We note that 2002 Neb. Laws, L.B. 1105, transfers § 75-604(5) to Neb. Rev. Stat. § 86-128(1)(b) (Cum. Supp. 2002), operative January 1, 2003, without substantive change. In addition, 2002 Neb. Laws, L.B. 1105, transfers § 86-2302(2) to Neb. Rev. Stat. § 86-575(2) (Cum. Supp. 2002), operative January 1, 2003, also without substantive change. Due to this recodification, we refer to the current statutes, rather than the statutes referenced by the parties. In its appellate brief and in a subsequently filed motion for summary dismissal, NTA asserted that the enactment of these statutory provisions rendered the issue presented by this appeal moot. LES filed an objection to the motion for summary dismissal and supporting brief in which it asserted that the pertinent provisions of L.B. 827 are preempted by the Telecommunications Act of 1996, 47 U.S.C. § 253 (2000), and are therefore unconstitutional under the Supremacy Clause of the U.S. Constitution. LES also addressed this issue in its reply brief, filed a separate “Notice of Constitutional Question,” and served copies of its briefs assigning the unconstitutionality of L.B. 827 pursuant to Neb. Ct. R. of

Prac. 9E (rev. 2000). The Attorney General has not entered an appearance or filed a brief on this issue.

[4] Although we overruled the motion for summary dismissal, the mootness issue has now been fully briefed and is before us. A moot case is one which seeks to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive. *Chambers v. Lautenbaugh*, 263 Neb. 920, 644 N.W.2d 540 (2002); *Wilcox v. City of McCook*, 262 Neb. 696, 634 N.W.2d 486 (2001). The Nebraska statutory provisions enacted after the Commission's order at issue in this case would clearly prohibit the city of Lincoln and LES from seeking authority as a telecommunications contract carrier. Unless LES is correct in its assertion that these statutory provisions are preempted by federal law, the single issue presented in this appeal would be moot. We therefore address the preemption issue.

The federal statute upon which LES bases its preemption argument provides in part:

(a) In general

No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of *any entity* to provide any inter-state or intrastate telecommunications service.

(b) State regulatory authority

Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) State and local government authority

Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

(Emphasis supplied.) 47 U.S.C. § 253. Federal courts interpreting the statute generally hold that subsection (a) imposes a

substantive limitation on state and local governments, while subsections (b) and (c) are “safe harbors” or exceptions to the general prohibition stated in subsection (a). See, *Missouri Mun. League v. F.C.C.*, 299 F.3d 949 (8th Cir. 2002); *New Jersey Payphone Ass’n v. Town of West New York*, 299 F.3d 235 (3d Cir. 2002); *BellSouth Telecommunications v. Town of Palm Beach*, 252 F.3d 1169 (11th Cir. 2001).

[5-7] Federal preemption arises from the Supremacy Clause of the U.S. Constitution and is the concept that state laws that conflict with federal law are invalid. *Eyl v. Ciba-Geigy Corp.*, 264 Neb. 582, 650 N.W.2d 744 (2002), citing U.S. Const. art. VI, cl. 2. There are three varieties of preemption: express, implied, and conflict preemption. *Id.* Express preemption arises when Congress has explicitly declared federal legislation to have a preemptive effect. It can also arise when a federal agency, acting within the scope of authority conferred upon it by Congress, has expressly declared an intent to preempt state law. *Id.* LES contends that express preemption arises from the plain language of 47 U.S.C. § 253(a) because it is an “entity” which Congress has determined may not be prohibited by the state from providing telecommunications services. Thus, it contends that §§ 86-128(1)(b) and 86-575(2) are preempted and unconstitutional. On the other hand, NTA argues that under rules governing federal statutory construction, the phrase “any entity” in 47 U.S.C. § 253(a) does not include municipalities which are traditionally subject to the overriding control of state legislatures, and thus the Nebraska statutes are not preempted. Both arguments are supported by case law.

NTA relies upon *City of Abilene, Texas v. F.C.C.*, 164 F.3d 49 (D.C. Cir. 1999), in which the U.S. Court of Appeals for the District of Columbia Circuit upheld a determination by the Federal Communications Commission (FCC) that § 253(a) did not preempt a Texas statute forbidding municipalities from providing telecommunications services. In its analysis, the court determined that § 253(a) must be construed in accordance with the precept enunciated in *Gregory v. Ashcroft*, 501 U.S. 452, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991), because “[t]o claim . . . that § 253(a) bars Texas from limiting the entry of its municipalities into the telecommunications business is to claim that

Congress altered the State's governmental structure." *City of Abilene, Texas*, 164 F.3d at 52. The precept of *Gregory, supra*, requires that if Congress intends to alter the usual constitutional balance between a state and its municipalities, it must make its intention "'unmistakably clear'" in the language of the statute. *Gregory*, 501 U.S. at 460, quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 105 S. Ct. 3142, 87 L. Ed. 2d 171 (1985) (specific holding superseded by statute). In *City of Abilene, Texas*, the court concluded that there was no such clarity in § 253(a), reasoning that the term "'entity'" was not defined in the Telecommunications Act. 164 F.3d at 52. Noting that it was linguistically possible to include a municipality under the heading "entity," the court found that it was not enough under the *Gregory* standard that the statute *could* bear such meaning. *City of Abilene, Texas, supra*. Instead, the court focused on the fact that there was no textual evidence to suggest that Congress, in using the word "entity," deliberated over the effect such use would have on state-local governmental relationships. *Id.* Noting that *Gregory* requires construction of a statute in favor of state sovereignty when the text fails to indicate congressional intent to the contrary, the court held that § 253(a) did not preempt the Texas statutes. *City of Abilene, Texas, supra*.

A similar conclusion was reached by the Iowa Supreme Court in *Iowa Telephone Ass'n v. City of Hawarden*, 589 N.W.2d 245 (Iowa 1999). In that case, the court began its analysis with the "plain-statement rule" derived from *Gregory, supra*, that "the courts will not interpret a federal statute in such a way as to intrude upon an area traditionally regulated by the states absent a clear expression of congressional intent to do so." *City of Hawarden*, 589 N.W.2d at 251. Relying on the decision of the FCC in *City of Abilene, Texas* (which was affirmed on appeal by the D.C. Circuit Court as discussed above), the Iowa court held without significant additional analysis that § 253(a) did not prevent the State of Iowa from regulating the provision of telecommunications services by its political subdivisions.

Subsequent to the decisions in *City of Abilene, Texas, supra*, and *City of Hawarden, supra*, two courts have reached the opposite conclusion. In *City of Bristol, VA v. Earley*, 145 F. Supp. 2d

741 (W.D. Va. 2001), a municipality sought a declaratory judgment that a Virginia statute prohibiting local governmental entities from offering telecommunications services to the general public was preempted by § 253(a). The court acknowledged that the challenged law related to the relationship between states and their political subdivisions, an area traditionally regulated by states. It also affirmed the principle that when a federal statute touches on an area traditionally within the exclusive control of states, Congress must make its intention to preempt “‘clear and manifest’” based on *Gregory v. Ashcroft*, 501 U.S. 452, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991). *Earley*, 145 F. Supp. at 747. However, guided by Supreme Court decisions holding that the use of the modifier “any” denoted an unambiguous legislative intent to impart an expansive scope to a statutory term, the district court determined that Congress’ use of the phrase “‘any entity’” made it “‘clear and manifest’” that § 253(a) was intended to have sweeping application, including application in those areas in which states traditionally enjoyed exclusive regulatory power. 145 F. Supp. at 747, citing *Salinas v. United States*, 522 U.S. 52, 118 S. Ct. 469, 139 L. Ed. 2d 352 (1997), and *United States v. Gonzales*, 520 U.S. 1, 117 S. Ct. 1032, 137 L. Ed. 2d 132 (1997). On this basis, the court held that the Virginia statute was preempted by § 253(a) and therefore invalid and unenforceable under the Supremacy Clause.

In *Missouri Mun. League v. F.C.C.*, 299 F.3d 949 (8th Cir. 2002), released after the instant case was argued and submitted, the U.S. Court of Appeals for the Eighth Circuit employed similar reasoning to conclude that a Missouri statute which prevented municipalities and municipally owned utilities from providing telecommunications services or facilities was preempted by § 253(a). In vacating an FCC order which relied heavily upon *City of Abilene, Texas v. F.C.C.*, 164 F.3d 49 (D.C. Cir. 1999), the court acknowledged its responsibility under *Gregory*, *supra*, to determine whether the statutory language plainly requires preemption. Focusing on the phrase “‘any entity,’” the court determined that the plain meaning of the term “‘entity’” included all business or governmental organizations, including municipalities. *Missouri Mun. League*, 299 F.3d at 953. Noting that “[t]ime and time again the Court has held that the modifier

‘any’ prohibits a narrowing construction of a statute,” *id.* at 954, the court concluded that “Congress’s use of [the term] ‘any’ to modify ‘entity’ signifies its intention to include within the statute all things that could be considered as entities.” *Id.* at 953-54, citing, inter alia, *Gonzales, supra*, and *Salinas, supra*. Specifically rejecting the reasoning of *City of Abilene, Texas*, the court in *Missouri Mun. League* stated:

The court, however, made no mention of the Supreme Court’s cases regarding the effect of the modifier “any” on the modified term, referring instead to Congress’s “tone of voice” regarding the term “any” and the “emphasis” Congress meant to place on different words. [Citation omitted.] . . . Whatever the reason for the D.C. Circuit’s decision not to consider and discuss *Salinas* and like cases, we view the lack of such a discussion as detracting from the persuasiveness of its opinion. The Supreme Court has repeatedly instructed us regarding the proper manner of interpreting the modifier “any,” and we follow that direction here.

299 F.3d at 955. The court therefore concluded that municipalities are included within the phrase “any entity” as used in § 253(a).

[8,9] Under the Supremacy Clause of the U.S. Constitution, state courts have a concurrent duty to enforce federal law. *Howlett v. Rose*, 496 U.S. 356, 110 S. Ct. 2430, 110 L. Ed. 2d 332 (1990); *Preister v. Madison County*, 258 Neb. 775, 606 N.W.2d 756 (2000). The Supreme Court has not addressed the specific preemption issue before us, and in the absence of an interpretation of § 253(a) by the Court, we are not bound by any circuit court’s interpretation. See *In re Search Warrant for 3628 V St.*, 262 Neb. 77, 628 N.W.2d 272 (2001). See, also, *Lockart v. Fretwell*, 506 U.S. 364, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993) (Thomas, J., concurring) (state courts bound by Supreme Court’s interpretation of federal law, but not bound by circuit court’s interpretation); *Bromley v. Crisp*, 561 F.2d 1351 (10th Cir. 1977) (state courts may express differing views on federal questions until guided by binding decision of Supreme Court). Here, we are persuaded by the reasoning of the Eighth Circuit that under the rule of statutory construction applied by the Supreme Court in *Salinas v. United States*, 522 U.S. 52, 118 S. Ct. 469, 139 L. Ed. 2d 352 (1997), and other cases, Congress’ use of the phrase

“any entity” in § 253(a) is indicative of an expansive statutory scope which includes a governmental entity, such as a municipally owned utility, seeking to provide telecommunications services. We conclude that §§ 86-128(1)(b) and 86-575(2) are absolute prohibitions which, as a matter of law, do not fall within the “safe harbor” provisions in § 253(b) and (c). Therefore, by virtue of the Supremacy Clause, §§ 86-128(1)(b) and 86-575(2) are preempted by federal law and are unconstitutional.

2. AUTHORITY TO OPERATE AS TELECOMMUNICATIONS CARRIER

Having concluded that LES is not *prohibited* by state law from seeking a certificate of public convenience and necessity to operate as a telecommunications carrier, we must now consider whether it is *authorized* to do so.

(a) Statutory Authority

[10] LES assigns that the Commission erred in declaring that § 15-201 does not permit the city of Lincoln to provide for-hire telecommunications services. This assignment, however, is not argued in the brief filed by LES. Errors that are assigned but not argued will not be addressed by an appellate court. *Caruso v. Parkos*, 262 Neb. 961, 637 N.W.2d 351 (2002); *Nicholson v. General Cas. Co. of Wis.*, 262 Neb. 879, 636 N.W.2d 372 (2001).

(b) Charter Authority of City of Lincoln

LES also contends that the home rule charter of the city of Lincoln confers authority on LES to provide for-hire telecommunications services. This charter was adopted in 1917 pursuant to article XI, § 2, of the Constitution of the State of Nebraska. This provision of our constitution, adopted in 1912, permits a city having a population of more than 5,000 to “frame a charter for its own government, consistent with and subject to the constitution and laws of this state.” Neb. Const. art. XI, § 2.

[11,12] A charter defining powers and duties is essential to the creation and existence of a municipal corporation. 2A Eugene McQuillin, *The Law of Municipal Corporations* § 9.01 (3d ed. 1996). Historically, states were viewed as possessing all powers necessary for the protection of the general public, and thus a municipality or local city government could exercise only

those powers specifically granted to it by the sovereign state. See *id.* A legislature's grant of powers to a municipality is often referred to as a "legislative charter." See *id.*, § 9.07 at 177. Legislative grants of power are strictly construed pursuant to what has become known as Dillon's rule, which provides:

"[A] municipal corporation possesses and can exercise these powers only: (1) Those granted in express terms; (2) those necessarily or fairly implied in, or incident to, the powers expressly granted; and (3) those essential to the declared objects and purposes of the municipality, not merely convenient, but indispensable."

Consumers Coal Co. v. City of Lincoln, 109 Neb. 51, 69-70, 189 N.W. 643, 650 (1922).

[13-15] In 1875, the home rule charter was originated by the constitution of Missouri. 2A McQuillin, *supra*, § 9.08. Other states, including Nebraska, adopted similar state constitutional provisions allowing for the adoption of home rule charters. See Neb. Const. art. XI, § 2. The purpose of a home rule charter is to render the city as nearly independent as possible from state interference. *Mollner v. City of Omaha*, 169 Neb. 44, 98 N.W.2d 33 (1959); 2A McQuillin, *supra*, § 9.08. Legally, a home rule charter is simply another method of empowering a municipality to govern its own affairs. See *id.* While a legislative charter emanates from the sovereign legislature, a home rule charter has as its basis a constitutional provision enacted by the sovereign people authorizing the electorate to empower municipalities with the authority to govern their own affairs. See *id.* While legislative charters are always grants of power that are strictly construed, home rule or constitutional charters may be either grants of power or limitations of power. 2A McQuillin, *supra*.

As noted, the Nebraska Constitution authorized the city of Lincoln to adopt a home rule charter. Neb. Const. art. XI, § 2. The question of the nature and extent of the power granted to the electorate of a city by this constitutional provision was addressed by this court in *Consumers Coal Co.*, *supra*. In that case, the plaintiff argued that there was no legal authority permitting the city to operate a public market for the purchase and sale of coal and wood. After examining the language of the Nebraska Constitution authorizing the adoption of home rule charters, we stated:

We hold that the city may by its charter under the Constitution provide for the exercise by the council of every power connected with the proper and efficient government of the municipality, including those powers so connected, which might lawfully be delegated to it by the legislature, without waiting for such delegation. It may provide for the exercise of power on subjects, connected with municipal concerns, which are also proper for state legislation, but upon which the state has not spoken, *until* it speaks.

(Emphasis in original.) *Consumers Coal Co.*, 109 Neb. at 58-59, 189 N.W. at 646. We further held that “it was within the competency of the electorate of the city of Lincoln to adopt a charter which under settled principles of construction would be a limitation as distinguished from a grant of power.” *Id.* at 66, 189 N.W. at 649. To determine what the people of the City of Lincoln did “‘with the sovereignty acquired by the adoption of a home rule charter,’” we held that it was necessary to examine the particular charter adopted in order to determine its effect. *Id.* A similar analysis is necessary in the instant case.

At the time *Consumers Coal Co.* was decided in 1922, article II, § 1, of the Lincoln Charter provided that “[w]ithout denial or disparagement of other powers held under the Constitution and laws of the state, the city of Lincoln shall have the right and power” to perform specifically enumerated functions. *Consumers Coal Co. v. City of Lincoln*, 109 Neb. 51, 67, 189 N.W. 643, 649 (1922). Based upon this language, we concluded that the charter was within that class of home rule charters that are construed to be grants of power, rather than limitations of power. As such, it was subject to the same principle of strict construction that was applicable to legislative grants of municipal charters. Finding no express grant of power authorizing the city to operate a private coal and wood market in the charter language, we concluded that the city lacked the authority to do so.

Article II of the Lincoln Charter, as amended in 1992, is significantly different. It provides in relevant part:

The City of Lincoln shall have the right and power to exercise all municipal powers, functions, rights, privileges, and immunities of every name and nature whatsoever that

it is possible for it to have at the present and in the future under the constitution of the State of Nebraska, except as prohibited by the state constitution or restricted by this charter, and to exercise any powers which may be implied thereby, incidental thereto, or appropriate to the exercise of such powers. The city shall also have the right and power to exercise all municipal powers, functions, rights, privileges, and immunities of every name and nature whatsoever that now are, or hereafter may be, granted by the laws of the State of Nebraska to all cities and villages or applicable to cities of the primary class, provided that such laws are not inconsistent with this charter.

Lincoln Charter, art. II, § 1, approved by voters on May 12, 1992. Unlike the 1922 charter, the broad language in this current charter does not merely enumerate specified powers, but, rather, grants all powers possible to the city. We conclude that the present charter is a limitation of powers charter, not a grant of powers charter. As such, the rule of strict construction, or Dillon's rule, does not apply, and the Commission erred in examining the charter language for an express or implied grant of power. See, *Consumers Coal Co.*, *supra*; 2A Eugene McQuillin, *The Law of Municipal Corporations* § 9.08 (3d ed. 1996). To determine whether the city of Lincoln possesses the requisite power to operate as a for-hire telecommunications carrier, we need only consider whether the charter's broad authorization to engage in municipal powers and functions encompasses the provision of for-hire telecommunications services.

(c) Is Provision of Proposed Services a Municipal Power?

NTA contends that the charter grants the city only "strictly municipal" powers. Brief for appellee at 31. It argues that the provision of for-hire telecommunications does not fall within this definition and is therefore precluded. LES, in contrast, argues that the limitation of powers charter grants the city all powers "'which might lawfully be delegated to the municipality by the legislature.'" Brief for appellant at 26. Because the Legislature could confer authority to engage in for-hire telecommunications upon the city, LES contends that it, as an operating division of the city, necessarily possesses that authority. We conclude that NTA's

interpretation of the powers granted by a limitation of powers charter is too narrow, while LES' is too broad.

[16] NTA's contention that a limitation of powers charter grants a city authority in only matters of "strictly municipal" concern is based upon a misinterpretation of our prior law and a mischaracterization of the legal issue presented in this case. NTA relies upon cases interpreting the "subject to the constitution and laws of this state" language in Neb. Const. art. XI, § 2. This language requires that a provision of a home rule charter must yield to a conflicting state statute, unless the provision relates to a matter of "strictly municipal" concern. E.g., *Jacobberger v. Terry*, 211 Neb. 878, 320 N.W.2d 903 (1982). Contrary to NTA's assertions, however, this analysis does not mean that a home rule city may act in only those areas that are "strictly municipal." Instead, such an entity may act in all matters necessary or incidental to its government, although municipal action will take precedence over conflicting state action only if the matter is one of strictly local concern. See, *id.*; *Consumers Coal Co. v. City of Lincoln*, 109 Neb. 51, 189 N.W. 643 (1922).

NTA also misconstrues the legal issue present in the instant case. It contends that the state's regulation of telecommunications services through the Commission necessarily establishes that this is an area of statewide concern and that a municipality therefore cannot, pursuant to its home rule charter, act in a conflicting manner. This rationale would be applicable if LES was attempting to *regulate* the telecommunications field. However, the issue in this case is whether LES has the legal authority to *provide* for-hire telecommunications services pursuant to the Lincoln home rule charter. In the instant case, there is no question that if LES may lawfully provide the services, it is subject to regulation by the Commission. Compare *Omaha & C.B. Street R. Co. v. City of Omaha*, 125 Neb. 825, 252 N.W. 407 (1934) (holding home rule charter did not authorize city to regulate bus service contrary to state regulation). There is no conflict between state law and the charter in this case, and therefore the "strictly municipal" analysis is inapplicable.

LES' interpretation of the powers granted by a limitation of powers charter in Nebraska is incorrect because in *Consumers Coal Co.*, we recognized that such a charter adopted pursuant to

the Nebraska Constitution does not grant “unlimited” power to a city. Quoting *State ex rel. v. Telephone Co.*, 189 Mo. 83, 88 S.W. 41 (1905), we held:

“But it is not every power that may be essayed to be conferred on the city by such a charter that is of the same force and effect as if it were conferred by an act of the general assembly, *because the Constitution does not confer on the city the right, in framing its charter, to assume all the powers that the state may exercise within the city limits, but only powers incident to its municipality*; yet the Legislature may, if it should see fit, confer on the city powers not necessary or incident to the city government. There are governmental powers the just exercise of which is essential to the happiness and well being of the people of a particular city, yet which are not of a character essentially appertaining to the city government. Such powers the state may reserve to be exercised by itself, or it may delegate them to the city, but until so delegated they are reserved. *The words in the Constitution, ‘may frame a charter for its own government,’ mean may frame a charter for the government of itself as a city, including all that is necessary or incident to the government of the municipality, but not all the power that the state has for the protection of the rights and regulation of the duties of the inhabitants in the city, as between themselves.*”

(Emphasis supplied.) *Consumers Coal Co.*, 109 Neb. at 57, 189 N.W. at 645. Thus, the city may exercise every power “*connected with the proper and efficient government of the municipality, including those powers so connected*, which might lawfully be delegated to it by the legislature, without waiting for such delegation.” (Emphasis supplied.) *Id.* at 58-59, 189 N.W. at 646. See, *Michelson v. City of Grand Island*, 154 Neb. 654, 48 N.W.2d 769 (1951); *Axberg v. City of Lincoln*, 141 Neb. 55, 2 N.W.2d 613 (1942). Pursuant to the “for its own government” limitation in our constitution, see article XI, § 2, the question is not whether the Legislature could have delegated the authority to provide for-hire telecommunications services to the city of Lincoln. Rather, the question is whether the provision of for-hire telecommunications services is an area that is necessary, incidental, or

connected with the proper and efficient government of the municipality of the city of Lincoln.

As we noted in *Consumers Coal Co. v. City of Lincoln*, 109 Neb. 51, 58, 189 N.W. 643, 646 (1922), resolution of this question is difficult for “[i]t is not easy in all cases to distinguish between municipal powers and state powers” Due to the difficult nature of the question, we must “content ourselves with the consideration of each case as it arises, applying those principles which precedent and logic approve.” *Id.*

Our precedent indicates that a city’s provision of retail services can be necessary or incidental to its proper and efficient government. This is particularly true in those circumstances where retail services are directly related to the provision of a public service. In *Consumers Coal Co.*, we impliedly held that the operation of a public market for the sale of wood and coal by the city was necessary or incidental to the proper and efficient government of the city. Four years later, we reached a similar conclusion in *Standard Oil Co. v. City of Lincoln*, 114 Neb. 243, 207 N.W. 172 (1926). In that case, an amendment to the Lincoln home rule charter expressly granted the city the power to engage in the business of selling gasoline and oil to the inhabitants of the city. The constitutionality of the amendment was challenged by a local business on the ground, inter alia, that the sale of gasoline and oil by the city “‘is not of, and does not pertain to, the government of said defendant city.’” *Id.* at 246, 207 N.W. at 173. We rejected the plaintiff’s argument, noting that the use of the commodity of gasoline had so steadily increased that it was “well-nigh universal” and that thus, its provision by the city was for a public purpose. *Id.* at 251, 207 N.W. at 175. We held that the charter provision delegated power to the city so that it “may do that which the state may do.” *Id.* at 252, 207 N.W. at 176.

Consideration of our precedent and the dictates of logic lead us to conclude that the provision of for-hire telecommunications services by the city of Lincoln is incidental to or connected with its powers of municipal government granted under its limitation of powers charter. Although the charter does not grant the city authority to do all that the state could do, provision of for-hire telecommunications, much like the provision of gasoline, serves a public purpose that is sufficiently related to the government of

the municipality of the city of Lincoln. See *Standard Oil Co.*, *supra*. The city seeks to provide telecommunications services by making efficient use of the facilities it already uses to provide public utilities, thus providing a further connection between the provision of for-hire telecommunications services and the necessary and incidental powers of municipal government. See, also, *Speidell Monuments v. Wyuka Cemetery*, 242 Neb. 134, 493 N.W.2d 336 (1992) (finding cemetery organized as public corporation had implied power to sell grave markers and monuments); *Nelson-Johnston & Doudna v. Metropolitan Utilities District*, 137 Neb. 871, 291 N.W. 558 (1940) (finding metropolitan utilities district empowered to engage in business of supplying water and gas had implied authority to sell gas appliances).

Based upon the foregoing, the Commission erred as a matter of law in determining that the city of Lincoln lacked the legal authority to engage in the provision of for-hire telecommunications services.

3. AUTHORITY OF LES

The remaining question is whether the city of Lincoln has properly delegated its authority to provide for-hire telecommunications services to LES. LES is an operating division of the city of Lincoln. The Lincoln City Council gives LES all of its powers and responsibilities by ordinance. According to Lincoln Mun. Code § 4.24 (2001), LES is governed by the LES administrative board. Section 4.24.060 of the code sets forth the general powers and duties of the administrative board and provides in pertinent part: “The Lincoln Electric System Administrative Board shall have general control of the Lincoln Electric System of the City of Lincoln including the responsibility for the control and management of the property, personnel, facilities, equipment, and finances of said Lincoln Electric System.” Section 4.24.070, which addresses the specific powers and duties granted to the board, further states: “The Board shall . . . (e) Do and perform all other acts necessary to efficiently maintain and operate the Lincoln Electric System including the management of the property, personnel, facilities and finances of the Lincoln Electric System, except those otherwise limited by the provisions of the ordinance.”

LES argues that “[i]nherent in these provisions is the Administrative Board’s mandate to maximize the use of all of LES’s resources in order to efficiently manage its property and finances.” Brief for appellant at 29. LES contends that productive use of its unused fiber-optic network falls within this mandate and that thus, the city council has authorized LES to engage in for-hire telecommunications services.

We disagree. LES is clearly authorized to provide electric service to citizens and businesses in Lincoln and the surrounding area in its capacity as a public utility. To the extent management of LES facilities and property relates to the provision of electric service, the city has delegated such authority to the LES board. However, use of LES’ facilities or property for an entirely different purpose, i.e., the provision of for-hire telecommunications services, is not a use that can be fairly considered to be within the powers delegated to LES by the city. This is especially true because the ordinance gives the LES board the power to perform all acts *necessary* to the efficient operation of the electric system. The record does not reflect that the use of excess fiber-optic capacity for the provision of for-hire telecommunications services is *necessary* to the efficient operation of the electric system. Therefore, the city of Lincoln has not, at this time, properly delegated authority to LES to utilize the excess fiber-optic capacity for the provision of for-hire telecommunications services.

V. CONCLUSION

For the foregoing reasons, §§ 86-128(1)(b) and 86-575(2) are preempted by federal law and are therefore unconstitutional under the Supremacy Clause of the U.S. Constitution. The current Lincoln home rule charter is a limitation of powers charter, and the Commission erred in applying a rule of strict construction to such charter. The Commission further erred as a matter of law in finding that the city of Lincoln lacked the legal authority to provide for-hire telecommunications services. However, because LES has not been authorized by ordinance to seek regulatory authority to provide such services, the Commission properly denied its application. We therefore affirm the denial of

the application on grounds other than those relied upon by the Commission majority.

AFFIRMED.

CHRIS M. NAUENBURG, APPELLANT AND CROSS-APPELLEE, v.
 SHARON LEWIS, APPELLEE AND CROSS-APPELLANT.
 JEREMY MCCLOUD AND LOGAN MCCLOUD, APPELLANTS
 AND CROSS-APPELLEES, v. SHARON LEWIS,
 APPELLEE AND CROSS-APPELLANT.

655 N.W.2d 19

Filed January 10, 2003. Nos. S-01-576, S-01-577.

1. **Jury Instructions.** Whether a jury instruction given by a trial court is correct is a question of law.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
3. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
4. **Jury Instructions: Appeal and Error.** In reviewing a claim of prejudice from instructions given or refused, the instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence, there is no prejudicial error.
5. **Police Officers and Sheriffs: Arrests: False Imprisonment: Liability.** A private citizen who, by affirmative direction, persuasion, or request, procures an unlawful arrest and detention of another is liable for false imprisonment. If an informer merely states to a peace officer his or her knowledge of a supposed offense and the officer makes the arrest entirely upon the officer's own judgment and discretion, the informer is not liable. If an informer knowingly gives to an officer false information which is a determining factor in the officer's decision to make an arrest, the informer is liable.
6. **Police Officers and Sheriffs: Public Health and Welfare.** A police officer on "off-duty" status is nevertheless not relieved of the obligation as an officer to preserve the public peace and to protect the lives and property of the citizens of the public in general. Indeed, police officers are considered to be under a duty to respond as police officers 24 hours a day.
7. **Police Officers and Sheriffs: Probable Cause.** Probable cause is to be evaluated by the collective information of the police engaged in a common investigation.

8. **Motor Vehicles: Police Officers and Sheriffs: Investigative Stops: Probable Cause: Corroboration.** A reasonably founded suspicion to stop a vehicle cannot be based solely on the receipt by the stopping officer of a radio dispatch to stop the described vehicle without any proof of the factual foundation for the relayed message.
9. **Appeal and Error.** A claimed prejudicial error must not only be assigned, but must also be discussed in the brief of the asserting party, and an appellate court will not consider assignments of error which are not discussed in the brief.

Appeals from the District Court for Scotts Bluff County:
ROBERT O. HIPPE, Judge. Affirmed.

James L. Zimmerman, of Sorensen, Zimmerman & Mickey, P.C., for appellants.

Steven W. Olsen, of Simmons, Olsen, Ediger, Selzer, Ferguson & Carney, P.C., for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, McCORMACK, and MILLER-LERMAN, JJ.

McCORMACK, J.

NATURE OF CASE

Chris M. Nauenburg, Jeremy McCloud, and Logan McCloud (collectively the appellants) brought these civil actions for false imprisonment against Sharon Lewis in the district court for Scotts Bluff County. The appellants allege that Lewis, acting as a private citizen, provided information to the Nebraska State Patrol which caused the State Patrol to falsely arrest and detain the appellants. A consolidated jury trial resulted in verdicts in Lewis' favor. The appellants filed these appeals, arguing error in the jury instructions, and Lewis cross-appealed. We find no error in the jury instructions and thus affirm.

BACKGROUND

On October 26, 1998, Lewis traveled from Kimball, Nebraska, to Scottsbluff, Nebraska, to attend a class. Lewis was employed as a Kimball police officer, but was off duty at all relevant times that day. On her way out of Kimball, Lewis drove past an apartment complex that was under surveillance. One of the residents of the complex had previously been arrested for possession of

drugs, and another was under suspicion for a burglary in which weapons had been stolen. Lewis was driving her personal vehicle at the time.

As Lewis approached the apartment complex, she saw a gray Mercury Cougar that had backed out of the complex's parking lot into the street. The Cougar was driven by Nauenburg, and Jeremy was a passenger in the car. The two drove off in the Cougar, but several blocks later, Lewis again encountered the Cougar as both vehicles departed Kimball on the same highway, with Lewis trailing behind the Cougar. As the vehicles were leaving Kimball on the highway, Lewis estimated that the Cougar was traveling approximately 55 m.p.h. in the 40-m.p.h. zone. After exiting the city limits, Lewis estimated that the Cougar was traveling at 75 m.p.h. in the 60-m.p.h. zone.

After a short distance, both vehicles reached the location at which the highway turns into a four-lane highway, with two lanes traveling in either direction. Lewis then observed the Cougar weaving in its lane, swerving across the centerline and onto the shoulder. Lewis called a State Patrol dispatcher to report her observations of Nauenburg's driving behavior, as well as the circumstances surrounding the apartment in Kimball from which they had left. The dispatcher relayed the information to a State Patrol trooper.

Lewis continued to follow the Cougar as both vehicles traveled toward Scottsbluff. After some time, Lewis noticed a second vehicle pass her and follow Nauenburg and Jeremy at a distance of less than one car length. This vehicle was driven by Logan. Lewis made a second call to the dispatcher to report her observations that the two vehicles were speeding and driving erratically, and the dispatcher again relayed the information to the State Patrol trooper.

The two vehicles driven by Nauenburg and Logan were stopped by several State Patrol troopers. With their guns drawn, the troopers ordered Nauenburg and Jeremy out of the Cougar and handcuffed them. Logan exited his vehicle and was also handcuffed. During the approximately 2-hour detainment at the side of the highway, the troopers did not discover any weapons or drugs. The troopers also determined that none of the

appellants were under the influence of drugs or alcohol. Nauenburg and Logan were cited for reckless driving, although the citations were later dismissed.

On May 4, 1999, Jeremy and Logan jointly filed a tort action against Lewis for outrageous conduct and false imprisonment. On June 4, Nauenburg did the same. After answering the petitions, Lewis filed a motion for summary judgment in each case. The district court granted each motion in part and denied each in part. The court found that there were no genuine issues of material fact and that Lewis was entitled to judgment as a matter of law on the appellants' outrageous conduct claims. However, the court also found that genuine issues of material fact existed as to the appellants' false imprisonment claims; thus, the now-consolidated cases proceeded to trial on these claims.

At trial, the jury was instructed that to recover, the appellants had to prove the following:

1. That

- a. Sharon Lewis knew her reports to the dispatcher were false, and that the reports were a determining factor in the officer's decision to arrest, or

- b. Sharon Lewis procured the [appellants'] unlawful arrest through her affirmative direction, persuasion, or request; and

2. That no probable cause existed to arrest the [appellants]; and

3. The nature and extent of damage suffered by the [appellants] proximately caused by the arrest.

The jury also received the following instructions:

In Nebraska, a peace officer may arrest a person without a warrant if the officer has probable cause to believe that such person has committed:

- (1) A felony; or

- (2) A misdemeanor, and the officer has probable cause to believe that such person either

- (a) will not be apprehended unless immediately arrested,

- (b) may cause injury to himself or herself or others or damage to property unless immediately arrested,

(c) may destroy or conceal evidence of the commission of such misdemeanor, or

(d) has committed a misdemeanor in the presence of the officer.

A private citizen who by affirmative direction, persuasion, or request procures an unlawful arrest and detention of another is liable for false imprisonment. If an informer merely states to a peace officer his or her knowledge of a supposed offense and the officer makes the arrest entirely upon the officer's own judgment and discretion, the informer is not liable. If an informer knowingly gives to an officer false information which is a determining factor in the officer's decision to make an arrest, the informer is liable.

After deliberating, the jury returned verdicts in favor of Lewis and against each of the appellants. The appellants' motions for new trial were denied, and these appeals followed. We moved the cases to our docket pursuant to our authority to regulate the caseloads of this court and the Nebraska Court of Appeals. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENTS OF ERROR

The appellants assign, restated, that the district court erred in (1) instructing the jury when a peace officer may arrest a person without a warrant and (2) refusing to allow them to ask Trooper Kevin Krzyzanowski at trial whether he agreed with the county attorney's decision to dismiss the traffic citations issued to Nauenburg and Logan.

On cross-appeal, Lewis assigns that the district court erred in (1) denying her motion for summary judgment on the issue of false imprisonment and (2) finding that the information supplied by Lewis was not privileged.

STANDARD OF REVIEW

[1,2] Whether a jury instruction given by a trial court is correct is a question of law. See *Malone v. American Bus. Info.*, 264 Neb. 127, 647 N.W.2d 569 (2002). When reviewing questions of law, an appellate court has an obligation to resolve the questions

independently of the conclusion reached by the trial court. *In re Application No. C-1889*, 264 Neb. 167, 647 N.W.2d 45 (2002).

ANALYSIS

[3,4] The issue presented by the appellants is whether the district court erred in instructing the jury when a peace officer may arrest a person without a warrant. In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001). In reviewing a claim of prejudice from instructions given or refused, the instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence, there is no prejudicial error. *Smith v. Fire Ins. Exch. of Los Angeles*, 261 Neb. 857, 626 N.W.2d 534 (2001).

[5] There is no dispute concerning the elements of a civil action for false imprisonment. A private citizen who, by affirmative direction, persuasion, or request, procures an unlawful arrest and detention of another is liable for false imprisonment. If an informer merely states to a peace officer his or her knowledge of a supposed offense and the officer makes the arrest entirely upon the officer's own judgment and discretion, the informer is not liable. If an informer knowingly gives to an officer false information which is a determining factor in the officer's decision to make an arrest, the informer is liable. *Johnson v. First Nat. Bank & Trust Co.*, 207 Neb. 521, 300 N.W.2d 10 (1980). The jury was correctly instructed regarding these elements.

[6] In addition, the jury was correctly instructed concerning when a peace officer may arrest a person without a warrant because such an instruction was supported by the evidence at trial. In *State v. Wilen*, 4 Neb. App. 132, 141-42, 539 N.W.2d 650, 658 (1995), the Court of Appeals recognized that

“[a] police officer on ‘off-duty’ status is nevertheless not relieved of the obligation as an officer to preserve the public peace and to protect the lives and property of the citizens of the public in general. Indeed, police officers are

considered to be under a duty to respond as police officers 24 hours a day.”

Quoting 16A Eugene McQuillin et al., *The Law of Municipal Corporations* § 45.15 (3d ed. 1992). Despite the fact that Lewis was off-duty on October 26, 1998, she nevertheless retained her status as a police officer, and the nature of her activities that day while off duty was connected to her official duties. She testified that she drove past the apartment complex where she had initially encountered Nauenburg and Jeremy because the complex had been under surveillance by the police. While Lewis’ status as a police officer may implicate issues of immunity, the parties have not raised this issue and we will not consider it.

[7,8] We have recognized that probable cause is to be evaluated by the collective information of the police engaged in a common investigation. See *State v. Soukharith*, 253 Neb. 310, 570 N.W.2d 344 (1997). A reasonably founded suspicion to stop a vehicle cannot be based solely on the receipt by the stopping officer of a radio dispatch to stop the described vehicle without any proof of the factual foundation for the relayed message. *Id.* The evidence in this case establishes that the State Patrol troopers who stopped the appellants had no firsthand knowledge of any facts constituting probable cause. However, probable cause was established by the collective knowledge of the police involved in the appellants’ stop. That includes the factual information personally observed by Lewis, acting in her official capacity as a police officer, and ultimately relayed to the State Patrol troopers.

Based on this analysis, the appellants’ argument fails. The inclusion of the disputed jury instruction did not prejudice the appellants. The instruction, a nearly verbatim reproduction of the relevant portions of Neb. Rev. Stat. § 29-404.02 (Reissue 1995), correctly stated the law in Nebraska. Furthermore, the instruction was supported by the evidence adduced at trial.

[9] The appellants also assign that the district court erred when it refused to allow them to ask Trooper Krzyzanowski at trial whether he agreed with the county attorney’s decision to dismiss the traffic citations issued to Nauenburg and Logan. However, the appellants fail to discuss this claimed prejudicial error in their briefs, and we will not consider it. See *Henriksen*

v. *Gleason*, 263 Neb. 840, 643 N.W.2d 652 (2002) (claimed prejudicial error must not only be assigned, but must also be discussed in brief of asserting party, and appellate court will not consider assignments of error which are not discussed in brief).

Given our resolution of the appellants' assignments of error, we need not address Lewis' cross-appeal.

CONCLUSION

The district court did not err in instructing the jury concerning when a peace officer may make an arrest without a warrant because such an instruction was warranted by the evidence and did not prejudice the appellants. Thus, the judgments of the district court are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, v.
TYLER J. KEUP, APPELLANT.
655 N.W.2d 25

Filed January 10, 2003. No. S-01-758.

1. **Motions to Suppress: Warrantless Searches: Probable Cause: Appeal and Error.** In reviewing a district court's ruling on a motion to suppress evidence obtained through a warrantless search or seizure, an appellate court conducts a de novo review of reasonable suspicion and probable cause determinations, and reviews factual findings for clear error, giving due weight to the inferences drawn from those facts by the trial judge.
2. **Trial: Convictions: Appeal and Error.** A conviction in a bench trial of a criminal case is sustained if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support that conviction. In making this determination, an appellate court does not resolve conflicts in evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented, which are within a fact finder's province for disposition.
3. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
4. **Criminal Law: Trial: Judges: Presumptions.** A trial judge is presumed in a jury-waived criminal trial to be familiar with and apply the proper rules of law, unless it clearly appears otherwise.

5. **Criminal Law: Judgments: Appeal and Error.** While in a bench trial of a criminal case the court's findings have the effect of a verdict and will not be set aside unless clearly erroneous, an appellate court has an obligation to reach an independent, correct conclusion regarding questions of law.
6. **Police Officers and Sheriffs: Search and Seizure: Evidence.** A warrantless seizure is justified under the plain view doctrine if (1) a law enforcement officer has a legal right to be in the place from which the object subject to the seizure could be plainly viewed, (2) the seized object's incriminating nature is immediately apparent, and (3) the officer has a lawful right of access to the seized object itself.
7. **Police Officers and Sheriffs: Search and Seizure: Probable Cause.** For an object's incriminating nature to be immediately apparent, the officer must have probable cause to associate the property with criminal activity.
8. **Search and Seizure: Probable Cause: Presumptions.** A seizure of property that is in plain view is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity.
9. **Probable Cause: Words and Phrases.** Probable cause is a flexible, commonsense standard. It merely requires that the facts available to the officer would warrant a person of reasonable caution in the belief that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false. A practical, nontechnical probability that incriminating evidence is involved is all that is required.
10. **Homicide: Intent: Weapons.** The intent to kill may be inferred, sufficient to support a murder conviction, from the defendant's deliberate use of a deadly weapon in a manner likely to cause death.
11. **Intent.** From circumstances around a defendant's voluntary and willful act, a finder of fact may infer that the defendant intended a reasonably probable result of his or her act.
12. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.
13. **Jury Instructions: Appeal and Error.** Failure to timely object to jury instructions prohibits a party from contending on appeal that the instructions were erroneous.
14. **Trial: Lesser-Included Offenses: Appeal and Error.** In a bench trial, the defendant must timely object to the trial court's consideration of lesser-included offenses in order to preserve that issue for appellate review.
15. **Appeal and Error.** In the absence of plain error, when an issue is raised for the first time in an appellate court, the issue will be disregarded inasmuch as the trial court cannot commit error regarding an issue never presented and submitted for disposition in the trial court.
16. _____. Plain error may be asserted for the first time on appeal or be noted by the appellate court on its own motion.
17. _____. Plain error will be noted only where an error is evident from the record, prejudicially affects a substantial right of a litigant, and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.
18. **Criminal Law: Lesser-Included Offenses.** In a bench trial, where the State fails to demonstrate a prima facie case on the crime charged, but does so on a lesser-included offense, the trial court may, in its discretion, dismiss the charge and consider all

properly submitted evidence relative to a lesser-included offense of the crime charged in the information.

19. **Homicide: Lesser-Included Offenses.** Second degree murder is a lesser-included offense of first degree murder.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Affirmed.

Robert P. Lindemeier, Lincoln County Public Defender, for appellant.

Don Stenberg, Attorney General, and Kimberly A. Klein for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

PROCEDURAL BACKGROUND

The defendant, Tyler J. Keup, was charged by complaint on August 8, 2000, with first degree murder, use of a firearm to commit a felony, and being a felon in possession of a firearm, in connection with the shooting death of Maricela Martinez. Keup waived a preliminary hearing and was bound over to the district court. An information was filed charging Keup with the offenses listed above, and on September 18, Keup entered a plea of not guilty. On January 16, 2001, Keup waived his right to a jury trial.

On February 16, 2001, Keup filed a pretrial motion to suppress evidence seized from Keup's home allegedly in violation of Keup's Fourth Amendment rights. As pertinent to this appeal, Keup sought to suppress a spiral notebook containing a "letter" written by Keup that described one version of the circumstances of Martinez' death. The district court overruled Keup's motion to suppress on February 27, based on the district court's conclusion that the notebook was in plain view when examined and seized. The facts relating to Keup's motion to suppress will be discussed in more detail below.

The case was tried to the court on February 27, 2001. Keup renewed his motion to suppress with a timely objection to the offer into evidence of the notebook. After the close of all the

evidence, Keup filed a motion to dismiss the charge of first degree murder, which was granted by the district court because there was no evidence of premeditation. The district court indicated, however, that it would consider lesser-included offenses of first degree murder. Keup and the State made closing arguments, during which Keup argued that the evidence did not prove beyond a reasonable doubt that Keup acted intentionally and that Keup should be convicted only of the lesser-included offense of manslaughter. At no point did Keup object to the court's consideration of lesser-included offenses.

The district court found Keup guilty of second degree murder, use of a weapon to commit a felony, and being a felon in possession of a firearm. Keup was sentenced to 25 to 50 years' imprisonment for second degree murder, 5 to 10 years' imprisonment for the use of a firearm to commit a felony, and 1 to 3 years' imprisonment for being a felon in possession of a firearm; the latter two terms of imprisonment were to run concurrently, and the second term of imprisonment was to run consecutively to the first. Keup appeals.

FACTUAL BACKGROUND

In June or July 2000, Keup told a friend, Michael L., that Keup wanted a handgun. Michael stole a ".25 millimeter semi-automatic handgun" in a burglary, and on August 3, Michael sold the gun to Keup for \$72. Keup later showed the gun to two of his friends. Keup told them that Keup intended to scare a person who had "ripped [Keup] off" in a drug-related transaction.

On August 4, 2000, Keup telephoned Martinez and tried to arrange the purchase of drugs. Tanya Lynn Barnett, Martinez' roommate, told Martinez to call Keup back so that they could "rip him off," meaning that they would take Keup's money but not provide drugs. Barnett then left the residence to go shopping. Keup went to Martinez' residence while Barnett was gone.

Keup took the gun with him when he went to Martinez' residence. Keup testified that he had no plan or intent to shoot Martinez and that he took the gun in order to trade or sell it to get drugs. Keup testified at trial that he and Martinez were playing with the gun by pointing it at each other and, in jest, threatening to fire. Keup's testimony at trial was that although he

knew the gun was loaded, he thought the safety was on, and was pointing the gun at Martinez' head with his finger on the trigger and the hammer pulled back when the gun just "went off."

Sgt. Mark F. Bohaty, an expert from the Nebraska State Patrol Criminalistics Laboratory, testified that he later tested the weapon and was unable to induce an accidental discharge. Bohaty also testified that he conducted a "trigger-pull test," intended to determine how much force could be applied to the trigger of the gun before the gun would fire. Bohaty testified that between 4 and 5.25 pounds would need to be applied, depending on which part of the trigger was pressed, before the trigger would activate. This was well above the industry standard of 3 pounds.

Keup testified that after the shooting, he grabbed his cigarettes, fled Martinez' residence, and went home, where, because he was scared, he lied to his parents and said that he had seen Martinez commit suicide. Additionally, Barnett testified that after she returned home, she noticed that Keup's telephone number had been erased from the caller identification device at Martinez' residence, although she and Martinez never erased telephone numbers from the device and all of the other calls remained in the device's memory.

When Barnett returned home, she called the 911 emergency dispatch service. Police responded and found Martinez dead, seated on her couch, with an apparent wound to the right temple. A single, small-caliber firearm casing was found on the floor 2 to 3 feet from Martinez' body. Martinez was taken to the hospital and was determined to have suffered a single gunshot wound to the head. It was determined, based on the bullet path and nature of the wound, that the gun was between 1 and 2 inches from Martinez' head when discharged.

Lt. Rick Ryan, of the North Platte Police Department, was at the hospital following Martinez' transport there, when he received a telephone call from Keup's father. Keup's father said that Keup had witnessed a suicide. Ryan met with Keup and Keup's parents at the police station. Keup's father brought a small handgun that had been given to him by Keup. This gun was later identified as the gun sold to Keup by Michael and was also determined to have discharged the shell casing that was found near Martinez' body.

Keup and his parents were read their *Miranda* rights and waived those rights and agreed to speak to Ryan. Keup stated to Ryan that Keup had telephoned Martinez and gone to Martinez' residence to retrieve some personal belongings. Keup told Ryan that Martinez had produced the gun, that Keup had handled it and given it back to Martinez, and that then, while Keup was looking away, the gun went off. Keup claimed to Ryan that because Keup was a convicted felon and Keup's fingerprints were on the gun, Keup took the gun and fled the scene.

Ryan asked Keup to take a polygraph examination, which was administered by Investigator Randy Billingsley of the North Platte Police Department. Based on the examination, Billingsley told Keup that Keup was being untruthful. The results of the polygraph examination were admitted into evidence at trial only as foundation for Keup's ensuing statements to Billingsley. When accused by Billingsley, Keup broke down and admitted that he had shot Martinez. Keup still claimed that the gun was Martinez' and that Keup had unloaded it and was playing with it when it went off. At trial, Keup admitted lying to both Ryan and Billingsley.

Investigator Matt Phillips of the North Platte Police Department testified that he was required to collect evidence of physical characteristics from Keup, including hair, blood, and urine samples. During these procedures, Keup asked if the judge would see the results of Keup's blood tests for drugs and alcohol. Phillips replied that the judge probably would see those test results. According to Phillips, Keup replied, "'Good, because there was nobody present when I shot her, and the only witnesses were those outside when I left.'"

Phillips also testified regarding the execution of a search warrant at Keup's residence on August 5, 2000. The search warrant described the items to be found, generally, as .25-caliber ammunition, the clothing and sunglasses worn by Keup at the time of the shooting, and the bicycle Keup used as transportation to and from Martinez' residence.

Phillips was searching the basement of the Keup residence looking for .25-caliber ammunition, which he described as being about one-half inch long and one-quarter inch wide. While searching the basement, Phillips saw a spiral notebook

“[l]aying in plain view on a shelf” about 2 to 3 feet off the ground. Phillips lifted the notebook up and saw that the page to which the notebook was open had text written on it that related to the death of Martinez, so Phillips seized the notebook. Phillips testified that he picked the notebook up and began reading it after he saw some of the words written on the top page.

The record contains a photograph taken at the scene of the notebook as it appeared when it was found, which indicates that the top page of writing was visible and legible to anyone in a position to look at the shelf. The page to which the notebook was open contains text that clearly relates to the death of Martinez. The writing begins “Dear Lord, I am afraid and scared” and sets forth a version of events that generally corresponds to the statement Keup made to Ryan, but later repudiated. At trial, Keup acknowledged the writing and claimed that he wrote it because he was “just trying to fool myself.”

The primary issue contested at trial was whether the gun fired accidentally or Keup fired the gun intentionally. After the close of the evidence and closing arguments, the district court concluded that Keup had pulled the trigger and fired the weapon intentionally, and was guilty of second degree murder.

ASSIGNMENTS OF ERROR

Keup assigns, restated, that the district court erred in (1) overruling his motion to suppress when the notebook was outside the scope of the warrant, no probable cause existed for the seizure, and the notebook was not in plain view; (2) finding Keup guilty of second degree murder when the specific findings by the district court are contradictory and confusing, indicating an erroneous application of the law and facts with regard to the element of intent; and (3) finding Keup guilty of second degree murder as a lesser-included offense of first degree murder, without jurisdiction and in violation of Keup’s right to due process, because (a) second degree murder is not a lesser-included offense of first degree murder and (b) Keup was acquitted of second degree murder when the district court dismissed the charge of first degree murder.

STANDARD OF REVIEW

[1] In reviewing a district court’s ruling on a motion to suppress evidence obtained through a warrantless search or seizure,

an appellate court conducts a de novo review of reasonable suspicion and probable cause determinations, and reviews factual findings for clear error, giving due weight to the inferences drawn from those facts by the trial judge. *State v. Roberts*, 261 Neb. 403, 623 N.W.2d 298 (2001).

[2-4] A conviction in a bench trial of a criminal case is sustained if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support that conviction. In making this determination, an appellate court does not resolve conflicts in evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented, which are within a fact finder's province for disposition. *State v. Harms*, 263 Neb. 814, 643 N.W.2d 359 (2002), *modified on denial of rehearing* 264 Neb. 654, 650 N.W.2d 481. When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Jackson*, 264 Neb. 420, 648 N.W.2d 282 (2002). A trial judge is presumed in a jury-waived criminal trial to be familiar with and apply the proper rules of law, unless it clearly appears otherwise. *State v. Lyle*, 258 Neb. 263, 603 N.W.2d 24 (1999).

[5] While in a bench trial of a criminal case the court's findings have the effect of a verdict and will not be set aside unless clearly erroneous, an appellate court has an obligation to reach an independent, correct conclusion regarding questions of law. *State v. Robbins*, 253 Neb. 146, 570 N.W.2d 185 (1997).

ANALYSIS

SEIZURE OF NOTEBOOK

The first issue we discuss is Phillips' seizure of Keup's notebook, which contained a "letter" written by Keup setting forth his initial, untruthful account of Martinez' death. It is not disputed that the notebook fell outside the scope of the search warrant Phillips was executing at the time he found the notebook; therefore, the subsequent seizure and search of the notebook were warrantless. The question is whether the notebook fell within the

plain view exception to the warrant requirement of the state and federal Constitutions.

[6] A warrantless seizure is justified under the plain view doctrine if (1) a law enforcement officer has a legal right to be in the place from which the object subject to the seizure could be plainly viewed, (2) the seized object's incriminating nature is immediately apparent, and (3) the officer has a lawful right of access to the seized object itself. *State v. Buckman*, 259 Neb. 924, 613 N.W.2d 463 (2000). In the present case, Keup admits that the search warrant gave Phillips the legal right to be in the place from which the notebook could be viewed, and Keup does not contest that Phillips had a lawful right of access to the notebook. Keup contends that the plain view exception does not apply because the incriminating nature of the notebook was not immediately apparent.

[7-9] For an object's incriminating nature to be immediately apparent, the officer must have probable cause to associate the property with criminal activity. See *Brayman v. U.S.*, 96 F.3d 1061 (8th Cir. 1996). A seizure of property that is in plain view is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity. *State v. Holman*, 221 Neb. 730, 380 N.W.2d 304 (1986). Probable cause is a flexible, commonsense standard. *Id.* It merely requires that the facts available to the officer would warrant a person of reasonable caution in the belief that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false. *Id.* A practical, nontechnical probability that incriminating evidence is involved is all that is required. *Id.* See *Texas v. Brown*, 460 U.S. 730, 103 S. Ct. 1535, 75 L. Ed. 2d 502 (1983).

In the instant case, the evidence shows that the notebook was found open and that the visible page of writing clearly related to the death of Martinez. Little more than a cursory glance at the notebook would have been necessary to warrant a reasonable belief that the notebook could be useful as evidence of a crime. The district court's factual conclusion in that regard is not clearly wrong. Once the incriminating nature of the notebook was established, Phillips had probable cause to seize the notebook.

Keup argues that the incriminating nature of the notebook was not immediately apparent because the notebook had to be read before its contents were known. This argument is without merit. Courts have generally held that the incriminating nature of written material is immediately apparent even if the material must be read in order to discern its content. See, e.g., *United States v. Crouch*, 648 F.2d 932 (4th Cir. 1981); *United States v. Ochs*, 595 F.2d 1247 (2d Cir. 1979); *Mapp v. Warden, N.Y. State Corr. Inst., Etc.*, 531 F.2d 1167 (2d Cir. 1976); *U.S. v. Small*, 664 F. Supp. 1357 (N.D. Cal. 1987); *Commonwealth v. D'Amour*, 428 Mass. 725, 704 N.E.2d 1166 (1999); *Daniels v. State*, 683 N.E.2d 557 (Ind. 1997); *State v. Andrei*, 574 A.2d 295 (Me. 1990); *State v. Parker*, 236 Kan. 353, 690 P.2d 1353 (1984); *People v. Dressler*, 317 Ill. App. 3d 379, 739 N.E.2d 630, 250 Ill. Dec. 867 (2000); *State v. Dobbs*, 100 N.M. 60, 665 P.2d 1151 (N.M. App. 1983). A billboard, placed by the side of a busy highway, is no less in "plain view" because passersby must read the billboard in order to determine its content. Similarly, in the instant case, the words written in the notebook were in plain view and their nature was immediately apparent, despite the fact that Phillips had to read the page in order to determine that.

Keup also argues that in order to determine whether the notebook contained any evidence of a crime, Phillips "had to read the note which this court can see is quite lengthy to determine that it was signed by [Keup] and that it referred to the crime the officer was investigating." Brief for appellant at 9. This argument is also without merit. The page to which the notebook was open, which was visible to Phillips, clearly related to the death of Martinez and afforded probable cause to seize the notebook and examine the rest of its contents. While further examination was necessary to verify that Keup had written the page that was visible, there was still a reasonable basis to associate the writing with the death of Martinez. In other words, even if the writing in the notebook had been signed by someone else, it was still immediately apparent that the writing was associated with Martinez' death.

Keup primarily relies on *Arizona v. Hicks*, 480 U.S. 321, 107 S. Ct. 1149, 94 L. Ed. 2d 347 (1987), to support his claim that the notebook was unlawfully seized. *Hicks*, however, does not

support Keup's argument. In *Hicks*, police entered an apartment after a bullet was fired through the floor of the apartment and into an apartment below. The police were searching for the shooter, weapons, and any other shooting victims. A police officer observed expensive stereo equipment and suspected it might be stolen, so the officer recorded the serial numbers of the equipment. The officer was required to move a turntable to view the serial numbers. When the equipment was determined to have been stolen, it was seized. See *id.*

The U.S. Supreme Court determined that the officer's warrantless search and seizure of the equipment did not fall within the plain view exception to the warrant requirement. The Court reasoned that the officer had conducted a search, without probable cause, by moving the turntable to view the serial numbers. However, the Court noted that the lawful objective of the officer's entry into the apartment was the search for the shooter, weapons, and any victims, and specifically stated that "[m]erely inspecting those parts of the turntable that came into view during the latter search would not have constituted an independent search, because it would have produced no additional invasion of respondent's privacy interest." 480 U.S. at 325.

In *Hicks*, the determinative fact was that the officer was required to move the equipment in order to view the serial numbers—in other words, the serial numbers were not in plain view and revealing them required a search without probable cause. See *id.* In this case, by contrast, the top page of the notebook was in plain view, and Phillips was not required to move the notebook in order to view the top page. After seeing the top page, Phillips had probable cause to seize and examine the notebook.

The district court found that the notebook was in plain view, and it was immediately apparent that the first page of the notebook was evidence concerning the crime. The district court's factual findings in that regard are supported by competent evidence and are not clearly wrong. Therefore, Keup's first assignment of error is without merit.

ELEMENT OF INTENT

[10] A person commits murder in the second degree if he or she causes the death of a person intentionally, but without

premeditation. Neb. Rev. Stat. § 28-304(1) (Reissue 1995). The intent to kill may be inferred, sufficient to support a murder conviction, from the defendant's deliberate use of a deadly weapon in a manner likely to cause death. *State v. Sims*, 258 Neb. 357, 603 N.W.2d 431 (1999).

Keup's argument with respect to the element of intent is somewhat perplexing. Keup's argument appears to be directed less at the sufficiency of the evidence to support a finding that Keup acted intentionally than at the district court's purportedly erroneous legal basis for that finding. Nonetheless, we note that to the extent Keup is arguing the evidence of intent was insufficient, that argument is without merit. The district court's factual finding that Keup acted intentionally is supported by competent evidence, described above, which, viewed and construed most favorably to the State, is sufficient to support the conviction. See *State v. Harms*, 263 Neb. 814, 643 N.W.2d 359 (2002), *modified on denial of rehearing* 264 Neb. 654, 650 N.W.2d 481.

Keup's primary argument seems to be that in making detailed findings of fact for the record, the district court somehow demonstrated a misunderstanding of the element of intent. A review of the district court's findings, however, reveals no error sufficient to overcome the presumption that the district court was familiar with and applied the proper rules of law. See *State v. Lyle*, 258 Neb. 263, 603 N.W.2d 24 (1999).

The district court specifically referred to and relied upon our decision in *State v. Rokus*, 240 Neb. 613, 483 N.W.2d 149 (1992). In that case, the defendant, Larry Rokus, who was eventually convicted of second degree murder, gave several conflicting versions of how the victim, Joseph Kashuba, was shot in the head at point-blank range. We summarized the interrogation of the defendant as follows:

In the course of this interrogation, Rokus said that he had wanted to show Kashuba how to load the .44 Magnum; therefore, he placed six hollow-point bullets in the revolver's cylinder and handed the loaded revolver to Kashuba. As Rokus described the situation, after Kashuba had examined the loaded revolver, he began "handing it back to [Rokus], butt first, the barrel towards Mr. Kashuba, and the gun . . . discharged." In response to

Rokus' description of the shooting, [the interrogating officer] said that in view of the fact that the Magnum was a "wheel gun or a cylinder type revolver," [he] "had problems with that story." At that point, Rokus acknowledged that he "had lied" and that the shooting actually occurred as Rokus was demonstrating a quick draw from the shoulder holster, which he was wearing, and when Rokus "quick drew," the revolver discharged the bullet that struck Kashuba. After additional questioning, the interrogation ended.

[Later, the interrogating officer] informed Rokus concerning Kashuba's wounds and told Rokus that the account of the shooting related by Rokus in the earlier interrogation was "not matching up" with the results of the autopsy. Rokus responded that Kashuba was killed while the pair was "playing Russian roulette." [The interrogating officer] asked how anyone could play Russian roulette with six bullets in the cylinder chambers of the fatal revolver, and Rokus answered that he and Kashuba "were simply pointing the gun at each other's heads and not pulling the trigger." Rokus then told the officers that while engaged in Russian roulette, he pointed the .44 Magnum at Kashuba, and the gun discharged. Rokus maintained that he did not intend to pull the trigger and that the shooting was an accident. Later in the course of this second interrogation, Rokus gave still another version of the shooting: Rokus, while Kashuba had his head turned away from Rokus, "took the gun out of the holster, placed it to the back of [Kashuba's] head," and said, "Surprise, mother fucker," as Rokus pulled the trigger.

Id. at 616-17, 483 N.W.2d at 152.

At trial, despite his earlier statements, Rokus testified that Kashuba was sitting in a chair when Rokus approached him from behind, pulled the .44 Magnum from its shoulder holster on Rokus, and then put the revolver to Kashuba's head, "'just joking around,'" and said, "'Surprise,'" as the gun discharged. *Id.* at 619, 483 N.W.2d at 153. Rokus had believed that the revolver was "unloaded" when he put the firearm to Kashuba's head and could not recall whether the revolver had been cocked. *Id.*

On appeal, we concluded that the evidence was sufficient to support the conviction. We stated:

Circumstances surrounding the fatal shot from Rokus' revolver allow and support the inference that Rokus intended to shoot and kill Kashuba. The jury was entitled to find that Kashuba was seated in a dining room chair while Rokus was approaching from behind Kashuba. From the location of the contact wound on Kashuba's head, the jury could infer that the fatal hollow-point bullet was fired at point-blank range from the .44 Magnum's muzzle at the base of Kashuba's skull; hence, Rokus was deliberately pointing the revolver at Kashuba when the weapon discharged. None can argue that a hollow-point bullet fired from a .44 Magnum is not a life-threatening projectile. Intent to kill may be inferred from deliberate use of a deadly weapon in a manner reasonably likely to cause death.

State v. Rokus, 240 Neb. 613, 621-22, 483 N.W.2d 149, 154-55 (1992).

[11] The pertinence of our decision in *Rokus* is evident, given the parallel between the issues presented in that case and the instant case. From circumstances around a defendant's voluntary and willful act, a finder of fact may infer that the defendant intended a reasonably probable result of his or her act. See *Rokus*, *supra*. The evidence presented in this case indicates that when the weapon was discharged, Keup was deliberately pointing the weapon at Martinez' head, at a distance of 1 to 2 inches, with his finger on the trigger and the hammer cocked. The State's firearms expert, Bohaty, testified that the trigger on the weapon required between 4 to 5.25 pounds of force before the weapon would discharge and that Bohaty was unable to induce an accidental discharge of the weapon. The evidence adequately supports the inference that Keup's firing of the weapon required a conscious and appreciable effort by Keup; thus, Keup's intent to cause Martinez' death may be inferred from the evidence. The district court's reliance on *Rokus* demonstrates that contrary to Keup's suggestion, the court correctly applied the law to the facts of the instant case with regard to the element of intent. Keup's assignment of error is without merit.

LESSER-INCLUDED OFFENSES

[12] Keup argues that the district court erred when, after dismissing the charge of first degree murder, the district court considered lesser-included homicide offenses. However, Keup waived any error in this regard by failing to present the issue to the district court with a timely objection. An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court. *State v. Faber*, 264 Neb. 198, 647 N.W.2d 67 (2002).

[13,14] The record in the instant case shows that Keup never objected to the district court's consideration of lesser-included offenses. The district court dismissed the first degree murder charge prior to closing arguments, then stated that it would consider lesser-included offenses. Keup and the State then made closing arguments. Keup specifically argued that the district court should find Keup guilty only of the lesser-included offense of manslaughter. This would be a peculiar trial strategy unless Keup was aware that the district court was considering second degree murder—yet Keup failed to object throughout. With respect to jury trials, we have often stated that failure to timely object to jury instructions prohibits a party from contending on appeal that the instructions were erroneous. See, e.g., *State v. Myers*, 258 Neb. 300, 603 N.W.2d 378 (1999). Likewise, in a bench trial, the defendant must timely object to the trial court's consideration of lesser-included offenses in order to preserve that issue for appellate review.

[15-17] In the absence of plain error, when an issue is raised for the first time in an appellate court, the issue will be disregarded inasmuch as the trial court cannot commit error regarding an issue never presented and submitted for disposition in the trial court. *State v. Tyma*, 264 Neb. 712, 651 N.W.2d 582 (2002). Plain error may be asserted for the first time on appeal or be noted by the appellate court on its own motion. *State v. Nelson*, 262 Neb. 896, 636 N.W.2d 620 (2001). Plain error will be noted only where an error is evident from the record, prejudicially affects a substantial right of a litigant, and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process. *Tyma*, *supra*.

[18,19] We find no plain error in the district court's consideration of the lesser-included offense of second degree murder. In a bench trial, where the State fails to demonstrate a prima facie case on the crime charged, but does so on a lesser-included offense, the trial court may, in its discretion, dismiss the charge and consider all properly submitted evidence relative to a lesser-included offense of the crime charged in the information. See *State v. Foster*, 230 Neb. 607, 433 N.W.2d 167 (1988). We have repeatedly held that second degree murder is a lesser-included offense of first degree murder. See, *State v. McCracken*, 260 Neb. 234, 615 N.W.2d 902 (2000), *abrogated on other grounds*, *State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002); *State v. Dixon*, 259 Neb. 976, 614 N.W.2d 288 (2000); *State v. Al-Zubaidy*, 253 Neb. 357, 570 N.W.2d 713 (1997). Thus, the district court did not commit plain error when it dismissed the first degree murder charge but considered the lesser-included offense of second degree murder. Keup also argues that he was not given notice that the State would be seeking a conviction on second degree murder, as Keup was charged only with first degree murder. However, Keup had notice that lesser-included offenses of first degree murder would be considered, pursuant to *Foster*, *supra*.

Finally, Keup argues that he was somehow impliedly acquitted of second degree murder when the district court dismissed the charge of first degree murder. This argument is contradicted by our holding in *State v. White*, 254 Neb. 566, 577 N.W.2d 741 (1998). In *White*, the defendant was charged with first degree murder and convicted of the lesser-included offense of second degree murder, but the second degree murder conviction was later vacated. We concluded that the conviction for second degree murder operated as an implied acquittal of first degree murder and that the Double Jeopardy Clause barred the State from retrying the defendant for the crime of first degree murder. See *White*, *supra*. However, we also stated that the State was not prevented from proceeding with a new trial on the vacated second degree murder conviction. See *id*. In the instant case, pursuant to *White*, the district court's dismissal of the charge of first degree murder did not acquit Keup of the lesser-included offense of second degree murder. Keup's argument provides no basis for a finding of plain error.

Keup did not make a timely objection to the district court's consideration of the lesser-included offenses to first degree murder, and the record does not show plain error. Keup's final assignment of error is without merit.

CONCLUSION

The district court did not err in denying Keup's motion to suppress evidence. The evidence is sufficient to sustain the district court's finding that Keup acted intentionally, and the court applied the correct legal standards in reaching that conclusion. Keup did not object to the district court's consideration of lesser-included offenses and has shown no basis for finding the court's consideration of lesser-included offenses to be plain error. Because Keup's assignments of error are without merit, the judgment of the district court is affirmed.

AFFIRMED.

AMERICAN LEGION POST 52, APPELLANT, V.
NEBRASKA LIQUOR CONTROL COMMISSION, APPELLEE.
655 N.W.2d 38

Filed January 10, 2003. No. S-01-1041.

1. **Administrative Law: Liquor Licenses: Appeal and Error.** Appeals from orders or decisions of the Nebraska Liquor Control Commission are taken in accordance with the Administrative Procedure Act.
2. **Administrative Law: Final Orders: Appeal and Error.** Proceedings for review of a final decision of an administrative agency shall be to the district court, which shall conduct the review without a jury de novo on the record of the agency.
3. ____: ____: ____: A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
4. **Administrative Law: Judgments: Appeal and Error.** When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
5. **Administrative Law: Statutes: Appeal and Error.** To the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.

Appeal from the District Court for Lancaster County: KAREN FLOWERS, Judge. Reversed and remanded with directions.

John M. Boehm and Patrick T. O'Brien, of Butler, Galter, O'Brien & Boehm, for appellant.

Don Stenberg, Attorney General, and Hobert B. Rupe for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, McCORMACK, and MILLER-LERMAN, JJ.

McCORMACK, J.

NATURE OF CASE

The Nebraska Liquor Control Commission (Commission) suspended the liquor license of American Legion Post 52 (Legion) after an administrative hearing. The district court affirmed the Commission's order, and the Legion appeals. We removed the case to this court's docket on our own motion pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

BACKGROUND

In March 2000, Nebraska State Patrol investigators conducted an inspection of the American Legion Club in Kearney. The inspection was conducted due to information received from the Nebraska Department of Revenue and "different individuals" that there was an illegal gambling device on the premises. During the inspection, investigators discovered and seized the following: (1) a wheel similar to a roulette wheel, which the Legion claims was purchased for fundraising and had yet to be used; (2) exhibit 1, what was determined to be an "8-liner" video gambling machine, which machine was unplugged and in an area away from the customers; (3) exhibit 2, a note which stated: "Mar 1 Wednesday VFW raided, machines and cash in safe confiscated; Legion machine in back room"; (4) exhibit 3, football sheets listing the teams and the point spreads for games in December 1998 and December 1999; (5) exhibit 4, sheets of paper which at the top was typed "\$3—33-Club" and listed a person's name, a team, and

whether they were “in or out for 1999”; and (6) exhibit 5, which is what appears to be a flyer that has typed on it:

Attention 33 Club participants[:] The N.F.L. [s]tarts on 9/12/99 if you want to be in this year’s 33-club, we are requiring that total dues for the season be paid in full before the season begins. Please let the bartender know if you want “in” or “out” of this year’s 33-club.

\$5 club= \$85

\$3 club=\$51

\$5-weekly payout/carryover [w]ill be \$150.00

\$3-weekly payout/carryover [w]ill be \$90.00

Prior to leaving the premises, the Legion was given an administrative citation for allowing unlawful activity and possessing a gambling device. A report was sent to the county attorney’s office, but there was no prosecution or conviction for any criminal charge arising out of this inspection.

On July 5, 2000, a letter was sent by the administrator of the legal division of the Commission to the Legion’s attorney, stating: “This is to confirm that, as per your request, the hearing upon the charge of an illegal activity, i.e., gambling, against the above licensee . . . has been continued to August 16 or 17, 2000.”

In August 2000, a hearing was held before the Commission in order to determine if the Legion’s liquor license should be suspended, canceled, or revoked pursuant to 237 Neb. Admin. Code, ch. 6, § 019.01Q (1999), of the rules and regulations of the Commission. The aforementioned rule provides that if the Commission finds by a preponderance of the evidence that the petitioner committed the offense of gambling or knowingly allowed such offense to be committed by others on the licensed premise it may suspend, cancel, or revoke the petitioner’s liquor license. In its order dated September 21, 2000, the Commission found: “[T]he licensee did, on or about March 8, 2000, permit or knowingly allow conduct on or about the licensed premise in violation of 237-LCC6-019.01Q of the Rules and Regulations of the Nebraska Liquor Control Commission, i.e., gambling.” The Commission suspended the Legion’s liquor license for 10 days.

Pursuant to Neb. Rev. Stat. §§ 84-917 to 84-919 (Reissue 1999) of the Administrative Procedure Act (APA), the Legion appealed the Commission’s decision to the district court. The district court

found that (1) there is a nexus between gambling and alcoholic liquor and therefore § 019.01Q is not in excess of the statutory authority granted to the Commission; (2) the Commission may exercise quasi-judicial power when it comes to civil proceedings to suspend, cancel, or revoke a liquor license and therefore is not in violation of the separation of powers with the judiciary; and (3) the exhibits, particularly exhibit 5, establish, by a preponderance of the evidence, that the Legion knowingly permitted others to engage in gambling at the license premises. Accordingly, the district court affirmed the Commission's decision. The Legion timely appealed, and pursuant to our power to regulate the caseloads of Nebraska's appellate courts, we moved the case to our docket.

ASSIGNMENTS OF ERROR

The Legion assigns, rephrased, that the district court erred in finding that (1) the Commission did not exceed its jurisdiction and statutory authority in promulgating rule and regulation § 019.01Q as it relates to gambling; (2) the Commission's finding that the Legion committed the offense of gambling was authorized and constitutional and did not interfere with the power of the judiciary pursuant to article II, § 1, of the Nebraska Constitution; and (3) there was competent evidence in the record to support the Commission's finding that the Legion permitted or knowingly allowed gambling on its premises on or about March 8, 2000.

STANDARD OF REVIEW

[1-4] Appeals from orders or decisions of the Commission are taken in accordance with the APA. Neb. Rev. Stat. § 53-1,116 (Cum. Supp. 2002); *City of Omaha v. Kum & Go*, 263 Neb. 724, 642 N.W.2d 154 (2002). Proceedings for review of a final decision of an administrative agency shall be to the district court, which shall conduct the review without a jury de novo on the record of the agency. *City of Omaha v. Kum & Go*, *supra*. A judgment or final order rendered by a district court in a judicial review pursuant to the APA may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Id.* When reviewing an order of a district court under the APA for errors appearing on the record, the inquiry is whether the

decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

[5] To the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Id.*

ANALYSIS

The Commission's charge against the Legion, pursuant to its "Illegal Activities" regulation, was for "illegal activity, i.e., gambling" on a specific date, March 8, 2000. Therefore, we limit the scope of our inquiry to the charge as framed by the Commission and as set forth in its order of September 21 that the Legion permitted or knowingly allowed gambling on the licensed premises on March 8.

The Commission's "Illegal Activities" regulation, § 019.01Q, states in relevant part:

Illegal Activities: The Commission finds that certain illegal activities may induce individuals to enter licensed premises and that the Commission has an interest in [e]nsuring that licensees do not use illegal means to promote the sale and consumption of alcohol. The Commission also believes the consumption of alcohol could impair judgment and could lesson inhibitions, causing some consumers to engage in illegal activities or to be victims of illegal activities on or about licensed premises, endangering the health, safety and welfare of individuals. The Commission, therefore, finds there is a nexus between the consumption of alcohol and certain illegal activities that occur within licensed premises or in adjacent related outdoor areas.

Such activities are: drug-related offenses, prostitution or pandering, assaults, sexual assaults, homicide, gambling, vandalism, weapons-related offenses, theft, disturbing the peace, violations of statutes or local ordinances relating to entertainment, acceptance of food stamps for the sale of alcohol or otherwise in violation of federal laws or regulations, and any offense referred to in Section 53-125 (4) or (5), whether or not there has been a plea of guilty or a conviction in criminal court.

If the Commission finds by a preponderance of the evidence that a licensee or employee or agent of a licensee has committed any of the foregoing illegal activities or has knowingly allowed such offense to be committed by others on the licensed premises or adjacent related outdoor areas, the Commission may suspend, cancel or revoke such license.

The Commission suspended the Legion's liquor license for illegal conduct, gambling, pursuant to its "Illegal Activities" regulation. The district court affirmed the suspension. On appeal, in assignment of error No. 3, the Legion asserts there was no competent evidence in the record to support the Commission's finding that the Legion permitted or knowingly allowed gambling on its premises on or about March 8, 2000. We agree.

Our analysis focuses on the date that the alleged gambling took place and its relation to the evidence found. We determine that none of the evidence found at the Legion supports the charge that gambling was permitted on the Legion's premises on or about March 8, 2000. Exhibit 1, the 8-liner video machine, was unplugged and in the back room; exhibit 2, the note, includes the date "Mar 1" but does not give the year it refers to; exhibit 3, the football sheets, were dated 1998 and 1999; exhibit 4, the "\$3—33-Club," was for the year 1999; exhibit 5, the flyer, talks of the 1999 football season. This leaves the wheel as the only potential evidence of "gambling" on March 8, 2000. The Legion claimed that the wheel had been purchased for fundraising and had yet to be used. There is no evidence to the contrary. We determine, in short, that there was no competent evidence presented that the Legion knowingly allowed gambling to be committed by others on March 8, 2000, in violation of § 019.01Q. Therefore, we reverse the findings of the district court.

CONCLUSION

In our review of the district court's decision, we determine that the decision of the district court is not supported by competent evidence. Therefore, we reverse the decision of the district court and remand the cause with directions to enter an order reversing the findings of the Commission and remanding the matter to the Commission with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS.

LORENA HERRERA, APPELLANT, V. FLEMING COMPANIES, INC.,
A FOREIGN CORPORATION FROM THE STATE OF OKLAHOMA
LICENSED TO DO BUSINESS IN THE STATE OF NEBRASKA,
DOING BUSINESS AS FESTIVAL FOODS, APPELLEE.
655 N.W.2d 378

Filed January 17, 2003. No. S-01-008.

1. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Negligence: Liability: Proximate Cause.** A possessor of land is subject to liability for injury caused to a lawful visitor by a condition on the land if (1) the possessor defendant either created the condition, knew of the condition, or by the exercise of reasonable care would have discovered the condition; (2) the defendant should have realized the condition involved an unreasonable risk of harm to the lawful visitor; (3) the defendant should have expected that a lawful visitor such as the plaintiff either (a) would not discover or realize the danger or (b) would fail to protect himself or herself against the danger; (4) the defendant failed to use reasonable care to protect the lawful visitor against the danger; and (5) the condition was a proximate cause of damage to the plaintiff.
3. **Negligence: Evidence: Proximate Cause.** A plaintiff in a premises liability case is required to adduce evidence showing that there was a negligent act on the part of the defendant and that such act was the cause of the plaintiff's injury.
4. **Negligence: Proximate Cause.** An allegation of negligence is insufficient where the finder of fact must guess at the cause of the accident.
5. **Negligence: Circumstantial Evidence: Proof: Proximate Cause.** While circumstantial evidence may be used to prove causation, the evidence must be sufficient to fairly and reasonably justify the conclusion that the defendant's negligence was the proximate cause of the plaintiff's injury.
6. **Negligence: Proof.** A person who alleges negligence on the part of another bears the burden to prove such negligence by direct or circumstantial evidence.
7. **Negligence: Presumptions.** The mere fact that an injury or accident occurred does not raise a presumption of negligence.

Petition for further review from the Nebraska Court of Appeals, HANNON, INBODY, and CARLSON, Judges, on appeal thereto from the District Court for Hall County, JAMES LIVINGSTON, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Todd V. Elsbernd, of Bradley, Maser, Kneale, Elsbernd & Emerton, P.C., for appellant.

Thomas J. Culhane, Patrick R. Guinan, and John C. Brownrigg, of Erickson & Sederstrom, P.C., for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

NATURE OF CASE

In this personal injury action, Fleming Companies, Inc., doing business as Festival Foods (Fleming), was granted further review of the decision of the Nebraska Court of Appeals which reversed an order of summary judgment entered by the Hall County District Court and remanded the cause for further proceedings. See *Herrera v. Fleming Cos.*, 10 Neb. App. 987, 641 N.W.2d 417 (2002).

SCOPE OF REVIEW

[1] Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *R.W. v. Schrein*, 264 Neb. 818, 652 N.W.2d 574 (2002).

FACTS

On December 18, 1998, Lorena Herrera slipped and fell as she entered a public restroom in the Festival Foods grocery store in Grand Island, Nebraska. Fred Groenke, the store director, was notified by an employee that Herrera had fallen. Groenke in turn called paramedics.

In an affidavit, Groenke stated that he observed a few drops of water on the restroom floor, as if someone had dripped water from his or her hands after washing them. He stated that no one had reported water on the restroom floor and that he did not know how long the water had been there prior to Herrera's fall. He asserted that the store had a policy of keeping the floors clean, that the floors were regularly inspected for spills by store employees, and that spills were cleaned up immediately.

Herrera stated in her deposition that after she opened the door to the restroom, she fell as she stepped in and stretched out her

hand to turn on the light. Herrera claimed that she did not notice water on the floor prior to her fall. She said that the entire floor was wet and that her clothes were wet after the fall. She did not know where the water came from or the length of time the floor had been wet. Herrera said that she hurt her right wrist, her back, and her head, which hit the wall as she fell, and that she was hospitalized for 3 days. She has had memory problems since the accident. Herrera's testimony was corroborated by Arturo Pimitel and their daughter Erika, who both accompanied Herrera to Festival Foods on the day of the accident.

Brad Jerman, one of the paramedics who was called to assist Herrera, stated in his affidavit that when he entered the restroom, he saw Herrera lying on the floor and observed water underneath and around her. He squatted next to Herrera to treat her rather than kneeling on the floor because he wanted to avoid getting his pants wet.

The Hall County District Court granted summary judgment in favor of Fleming. The court stated that the case raised a question of storekeeper liability to a business invitee. The court held that in such a case, the plaintiff must establish several elements, including that the business owner created the condition that caused the accident, knew of the condition, or by exercise of reasonable care should have discovered the condition. The court found that Herrera failed to present evidence to establish that Fleming knew of the water or should have known of the water and failed to present evidence from which liability could be inferred.

The Court of Appeals reversed the judgment and remanded the cause for further proceedings. See *Herrera v. Fleming Cos.*, 10 Neb. App. 987, 641 N.W.2d 417 (2002). In doing so, the Court of Appeals construed *Heins v. Webster County*, 250 Neb. 750, 552 N.W.2d 51 (1996), as establishing a new standard for determining when an owner or possessor of land is liable to a lawful visitor for injury caused by a condition on the premises, stating that under *Heins*, the test is whether the landowner or possessor exercised reasonable care.

The Court of Appeals held that Fleming did not establish the standard of care used by similar facilities, nor did it establish the meaning of the term "regularly inspected." *Herrera v. Fleming Cos.*, 10 Neb. App. at 992, 641 N.W.2d at 422. Therefore,

according to the Court of Appeals, Fleming had not presented sufficient evidence to make a prima facie showing that it exercised reasonable care, which would then require Herrera to rebut the evidence. The Court of Appeals concluded that the district court erred as a matter of law in granting Fleming's motion for summary judgment because Fleming did not make a prima facie showing and because the amount of water on the restroom floor was a material issue of fact in dispute. We granted Fleming's petition for further review.

ASSIGNMENTS OF ERROR

In seeking further review, Fleming assigned as error (1) the Court of Appeals' holding that *Heins* abrogated Herrera's burden to establish a prima facie case of negligence; (2) the Court of Appeals' holding that Herrera was not required to present evidence that Fleming created the condition, knew of the condition, or by exercise of reasonable care could have discovered the condition present on the restroom floor; (3) the Court of Appeals' holding that *Heins* shifted the burden of proof to Fleming to prove that Herrera's fall was not caused by negligence on its part; and (4) the Court of Appeals' failure to affirm the order granting summary judgment.

ANALYSIS

In *Heins*, this court abrogated the common-law distinction between business invitees and licensees and the duty of care owed them. Prior to *Heins*, landowners owed invitees a duty of reasonable care to keep the premises safe for the use of the invitee, see *Neff v. Clark*, 219 Neb. 521, 363 N.W.2d 925 (1985), and a greater duty was owed to an invitee than was owed to a licensee. A licensee was defined as a person who was privileged to enter or remain upon the premises of another by virtue of the possessor's express or implied consent but who was not a business visitor. *Heins v. Webster County*, *supra*. The duty owed by an owner or occupant of a premises to a licensee was to refrain from injuring the licensee by willful or wanton negligence or designed injury, or to warn him, as a licensee, of a hidden danger or peril known to the owner or occupant but unknown to or unobservable by the licensee, who was required to exercise ordinary care. *Id.*

In *Heins v. Webster County*, 250 Neb. 750, 552 N.W.2d 51 (1996), we held that a landowner must exercise reasonable care toward all lawful visitors, and we set forth several factors to be considered in evaluating whether reasonable care has been exercised. Among the factors to be considered are (1) the foreseeability or possibility of harm; (2) the purpose for which the entrant entered the premises; (3) the time, manner, and circumstances under which the entrant entered the premises; (4) the use to which the premises are put or are expected to be put; (5) the reasonableness of the inspection, repair, or warning; (6) the opportunity and ease of repair or correction or giving of the warning; and (7) the burden on the land occupier and/or community in terms of inconvenience or cost in providing adequate protection. *Id.* We retained a separate classification for trespassers because we concluded that one did not owe a duty to exercise reasonable care to those not lawfully on one's property. We expressly stated that our holding did not mean that owners and occupiers of land were now insurers of their premises. *Id.*

[2] *Heins* did not abrogate the elements necessary to establish liability on the part of a possessor of land for injury caused to a lawful visitor by a condition on the land. A possessor of land is subject to liability for injury caused to a lawful visitor by a condition on the land if (1) the possessor defendant either created the condition, knew of the condition, or by the exercise of reasonable care would have discovered the condition; (2) the defendant should have realized the condition involved an unreasonable risk of harm to the lawful visitor; (3) the defendant should have expected that a lawful visitor such as the plaintiff either (a) would not discover or realize the danger or (b) would fail to protect himself or herself against the danger; (4) the defendant failed to use reasonable care to protect the lawful visitor against the danger; and (5) the condition was a proximate cause of damage to the plaintiff. See, *Derr v. Columbus Convention Ctr.*, 258 Neb. 537, 604 N.W.2d 414 (2000); *Chelberg v. Guitars & Cadillacs*, 253 Neb. 830, 572 N.W.2d 356 (1998). The several factors described in *Heins* regarding reasonable care are to be considered under subsection (4) above.

The Court of Appeals erred in its analysis of *Heins*. In a premises liability case involving a slip-and-fall accident, it is

incumbent upon the plaintiff to show that the accident was a result of the defendant's negligence. The Court of Appeals found that Fleming had not established the standard of care used by similar facilities to inspect its floors and did not establish the meaning of the term "regularly inspected." The court therefore concluded that Fleming did not present sufficient evidence to make a prima facie showing that it had exercised reasonable care, thereby requiring Herrera to rebut the evidence.

[3-5] A plaintiff in a premises liability case is required to adduce evidence showing that there was a negligent act on the part of the defendant and that such act was the cause of the plaintiff's injury. See *King v. Crowell Memorial Home*, 261 Neb. 177, 622 N.W.2d 588 (2001). An allegation of negligence is insufficient where the finder of fact must guess at the cause of the accident. *Id.* While circumstantial evidence may be used to prove causation, the evidence must be sufficient to fairly and reasonably justify the conclusion that the defendant's negligence was the proximate cause of the plaintiff's injury. *Id.*

[6,7] A person who alleges negligence on the part of another bears the burden to prove such negligence by direct or circumstantial evidence. See *Bargmann v. Soll Oil Co.*, 253 Neb. 1018, 574 N.W.2d 478 (1998). The mere fact that an injury or accident occurred does not raise a presumption of negligence. See, *id.*; *Holden v. Urban*, 224 Neb. 472, 398 N.W.2d 699 (1987).

At the hearing on its motion for summary judgment, Fleming offered the deposition of Herrera. In her deposition, Herrera stated she did not know how long the water had been on the floor. Fleming's store director stated in his affidavit that no one had reported water on the restroom floor and that he did not know how long the water had been there. The store had a policy of keeping the floors clean, and the floors were regularly inspected for spills. From this evidence, no reasonable inference could be drawn as to how long the water had been on the floor.

Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *R.W. v. Schrein*, 264 Neb. 818, 652 N.W.2d 574 (2002). A

prima facie case for summary judgment is shown by producing enough evidence to demonstrate that the movant is entitled to a judgment in its favor if the evidence were uncontroverted at trial. At that point, the burden of producing evidence shifts to the party opposing the motion. *Durkan v. Vaughan*, 259 Neb. 288, 609 N.W.2d 358 (2000).

In a premises liability case, the plaintiff must establish that the defendant created the condition, knew of the condition, or by the exercise of reasonable care should have discovered or known of the condition. Herrera did not allege that Fleming created this condition but that Fleming knew or should have known of the water on the restroom floor. As the party moving for summary judgment, Fleming established that no one knew how long the water had been on the floor. There was no evidence or reasonable inference that Fleming created the condition, knew of the condition, or should have known of the condition. If these facts remained uncontroverted, Fleming was entitled to a judgment as a matter of law. Therefore, the burden shifted to Herrera.

The burden having been shifted to Herrera, she failed to produce any evidence from which a reasonable inference could be drawn that Fleming knew or by the exercise of reasonable care should have known of the water on the floor. Thus, the district court correctly determined that Fleming was entitled to judgment as a matter of law.

CONCLUSION

For the reasons set forth herein, we reverse the decision of the Court of Appeals and remand the cause thereto with directions to affirm the judgment of the district court.

REVERSED AND REMANDED WITH DIRECTIONS.

KELLY GUENZEL-HANDLOS, APPELLANT, V.
THE COUNTY OF LANCASTER, NEBRASKA,
A POLITICAL SUBDIVISION, APPELLEE.
655 N.W.2d 384

Filed January 17, 2003. No. S-01-1118.

1. **Trial: Pleadings: Pretrial Procedure.** A motion for judgment on the pleadings is properly granted when it appears from the pleadings that only questions of law are presented.
2. **Judgments: Statutes: Appeal and Error.** In connection with questions of law and statutory interpretation, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
3. **Political Subdivisions: Counties: Legislature.** A county is a political subdivision of the state and has only that power delegated to it by the Legislature.
4. **Political Subdivisions: Counties.** Any grant of power to a political subdivision is to be strictly construed, and any reasonable doubt of the existence of a power is to be resolved against the county.
5. **Statutes.** If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning.
6. **Counties: Public Officers and Employees: Criminal Law: Liability.** A county is interested in a criminal action against a county official within the meaning of Neb. Rev. Stat. § 23-1201(2) (Reissue 1997) when a conviction could expose the county to liability or substantially impair the performance of an essential governmental function.
7. **Public Purpose.** Public funds cannot be expended for private purposes.
8. **Public Purpose: Legislature.** What constitutes a public purpose, as opposed to a private purpose, is primarily for the Legislature to determine.

Appeal from the District Court for Lancaster County: JAMES A. BUCKLEY, District Judge, Retired. Affirmed.

Vincent Valentino, of Angle, Murphy, Valentino & Campbell, P.C., for appellant.

William F. Austin, of Erickson & Sederstrom, P.C., for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, McCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

Following her acquittal on misdemeanor charges relating to an incident which occurred in the performance of her duties as

clerk of the district court for Lancaster County, Kelly Guenzel-Handlos brought this action against the county seeking reimbursement of fees and expenses incurred in her defense. The district court for Lancaster County sustained the county's motion for judgment on the pleadings and dismissed the petition. Guenzel-Handlos appeals.

FACTS

At all relevant times, Guenzel-Handlos was the duly elected clerk of the district court for Lancaster County, Nebraska, a body corporate and politic. After receiving allegations of Guenzel-Handlos' misconduct, the Lancaster County Attorney's office requested appointment of a special prosecutor. This request was granted by the district court. On September 25, 2000, the special prosecutor filed a complaint charging Guenzel-Handlos with official misconduct and misuse of public property or funds in the discharge of her official duties. Guenzel-Handlos requested legal representation by the county attorney but was advised that she would be required to retain her own counsel, which she subsequently did. Following a bench trial in Lancaster County Court on December 13 and 14, 2000, Guenzel-Handlos was acquitted of all charges.

Guenzel-Handlos filed a claim with the Lancaster County Board seeking reimbursement in the amount of \$18,453.89 for attorney fees, costs, and expenses incurred by her in defending the misconduct charges. The county board denied the claim on July 10, 2001. Guenzel-Handlos then commenced this action in the district court for Lancaster County, seeking reimbursement on three alternate legal theories, each of which she designated as a cause of action. This court appointed the Honorable James A. Buckley, a retired district court judge, to serve as an active judge of the district court for Lancaster County for the purpose of hearing and deciding this case.

Under her first theory of recovery, Guenzel-Handlos contended that the county board erred in denying her claim, properly filed under Neb. Rev. Stat. § 23-135 (Cum. Supp. 2002). Under her second theory, Guenzel-Handlos sought a declaratory judgment that Neb. Rev. Stat. §§ 13-1801 and 23-1201(2) (Reissue 1997), as well as principles of indemnification, permit the expenditure of

public funds to reimburse a public official for defending herself against charges arising from the performance of her official duties. Under her third theory, Guenzel-Handlos contended that the county is liable to her under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. § 13-901 et seq. (Reissue 1997 & Supp. 1999), because it had a duty to defend her pursuant to § 23-1201(2), it breached its duty, and that breach proximately caused her to incur defense costs.

In its answer, the county admitted the material facts underlying Guenzel-Handlos' claim, but asserted several affirmative defenses and alleged that Guenzel-Handlos failed to state a claim upon which relief could be granted. The county subsequently filed a motion for judgment on the pleadings. In granting the motion and dismissing the action, the district court concluded that "no Nebraska statute or case law or any common law doctrine would require indemnification." Guenzel-Handlos perfected this timely appeal, which we moved to our docket on our own motion pursuant to our authority to regulate the caseloads of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENTS OF ERROR

Guenzel-Handlos assigns, restated, that the trial court erred in sustaining the motion for judgment on the pleadings with respect to (1) her claim based on § 23-135, (2) her claim for declaratory judgment, and (3) her claim under the Political Subdivisions Tort Claims Act.

STANDARD OF REVIEW

[1] A motion for judgment on the pleadings is properly granted when it appears from the pleadings that only questions of law are presented. *Nelson v. City of Omaha*, 256 Neb. 303, 589 N.W.2d 522 (1999); *County of Seward v. Andelt*, 251 Neb. 713, 559 N.W.2d 465 (1997); *Bohl v. Buffalo Cty.*, 251 Neb. 492, 557 N.W.2d 668 (1997).

[2] In connection with questions of law and statutory interpretation, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Jeffrey Lake Dev. v. Central Neb. Pub. Power*, 262

Neb. 515, 633 N.W.2d 102 (2001); *In re Estate of Tvrz*, 260 Neb. 991, 620 N.W.2d 757 (2001).

ANALYSIS

Guenzel-Handlos argues that the district court improperly dismissed her appeal, properly filed under § 23-135, “without a full examination of the underlying facts.” Brief for appellant at 10. However, a motion for judgment on the pleadings admits the truth of all well-pled facts in the opposing party’s pleadings, together with all reasonable inferences to be drawn therefrom, and the moving party admits, for the purpose of the motion, the untruth of the movant’s allegations insofar as they have been controverted. *Mach v. County of Douglas*, 259 Neb. 787, 612 N.W.2d 237 (2000); *Becker v. Hobbs*, 256 Neb. 432, 590 N.W.2d 360 (1999). Thus, the issue which was before the district court, and now before this court, is whether the county had a legal duty to reimburse Guenzel-Handlos, assuming all of her factual allegations to be true. The question of whether a duty exists is a question of law. See *Cerny v. Cedar Bluffs Jr./Sr. Pub. Sch.*, 262 Neb. 66, 628 N.W.2d 697 (2001).

[3,4] To determine whether a duty exists in this case, we must examine each of the substantive statutory and common-law legal theories upon which Guenzel-Handlos relies. Before doing so, however, we note certain general principles which govern our consideration. A county is a political subdivision of the state and has only that power delegated to it by the Legislature. *DLH, Inc. v. Lancaster Cty. Bd. of Comrs.*, 264 Neb. 358, 648 N.W.2d 277 (2002); *Enterprise Partners v. County of Perkins*, 260 Neb. 650, 619 N.W.2d 464 (2000). Any grant of power to a political subdivision is to be strictly construed, *Enterprise Partners v. County of Perkins*, *supra*, and *Metropolitan Utilities Dist. v. Twin Platte NRD*, 250 Neb. 442, 550 N.W.2d 907 (1996), and any reasonable doubt of the existence of a power is to be resolved against the county. *Shanahan v. Johnson*, 170 Neb. 399, 102 N.W.2d 858 (1960).

[5] Guenzel-Handlos first argues that the county had a duty to defend her under § 13-1801 and, having failed to do so, has a duty to reimburse her for the costs of her defense. Section 13-1801 provides in relevant part:

If any legal action shall be brought against any municipal police officer, constable, county sheriff, deputy sheriff, firefighter, out-of-hospital emergency care provider, or other elected or appointed official of any political subdivision . . . based upon the negligent error or omission of such person while in the performance of his or her lawful duties, the political subdivision which employs, appoints, or otherwise designates such person an employee . . . shall defend him or her against such action, and if final judgment is rendered against such person, such political subdivision shall pay such judgment in his or her behalf and shall have no right to restitution from such person.

. . . This section shall not be construed to permit a political subdivision to pay for a judgment obtained against a person as a result of illegal acts committed by such person. We have not previously construed this statute. However, we have often stated that if the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning. *Eyl v. Ciba-Geigy Corp.*, 264 Neb. 582, 650 N.W.2d 744 (2002); *Gracey v. Zwonechek*, 263 Neb. 796, 643 N.W.2d 381 (2002); *City of Omaha v. Kum & Go*, 263 Neb. 724, 642 N.W.2d 154 (2002). That principle applies here. The clear language of § 13-1801 limits its scope to the defense of civil actions for damages based upon negligent error or omission on the part of certain public officials. The statute has no application to the defense of criminal charges. The district court did not err in determining that § 13-1801 does not create a duty on the part of the county to reimburse Guenzel-Handlos for the cost of her criminal defense.

Guenzel-Handlos also relies on § 23-1201(2) as the basis for her claim that the county has a duty to reimburse her defense costs. That statute provides in relevant part that “[i]t shall be the duty of the county attorney to prosecute or defend, on behalf of the state and county, all suits, applications, or motions, civil or criminal, arising under the laws of the state in which the state or the county is a party or interested.” Guenzel-Handlos argues that this statute obligated the Lancaster County Attorney to defend her in the criminal case, that he “failed and neglected” to do so, and that the county was therefore liable to her under the Political Subdivisions Tort Claims Act.

Whether § 23-1201(2) affords any basis for the legal duty claimed in this case depends upon whether the county was “a party or interested” in the criminal proceedings against Guenzel-Handlos. The county was clearly not a party to the criminal action. Whether it was “interested” in the proceeding within the meaning of § 23-1201(2) presents a more complicated inquiry. Guenzel-Handlos contends that the county should be considered “interested” in the criminal action because if she had been convicted, she would have been subject to removal from office pursuant to Neb. Rev. Stat. § 23-2001(7) (Reissue 1997), which in turn would have disrupted the smooth operations of the Lancaster County District Court’s office. This argument rests on the assumption that the Legislature intended any possible disruption in the operation of a state or county office to give rise to the requisite “interest” under § 23-1201(2), thereby imposing a duty on the county attorney to defend *every* criminal action brought against *any* county official. Guenzel-Handlos offers no authority for such an expansive interpretation.

[6] We decline to adopt this interpretation of the statutory language and conclude that a county is “interested” in a criminal action against a county official within the meaning of § 23-1201(2) when a conviction could expose the county to liability or substantially impair the performance of an essential governmental function. For example, in *City of Montgomery v. Collins*, 355 So. 2d 1111 (Ala. 1978), the Alabama Supreme Court considered whether a city could lawfully pay municipal funds to private counsel for defending police officers indicted on conspiracy charges. The court reasoned:

Because a [criminal conviction] might provide a basis for a civil cause of action . . . and because a municipality may be made a party defendant in such an action . . . it would be within the reasonable scope of “proper corporate interest” for the municipality to attempt to protect itself and its officers against future civil litigation brought under agency principles by defending their agents against criminal charges arising out of the same general circumstances with the view of obtaining their acquittal. A judgment of conviction in a criminal case is admissible, as a general

rule, in a civil case if the act in question is material in the civil action.

(Citations omitted.) *Id.* at 1114-15.

In this case, the criminal prosecution against Guenzel-Handlos carried no potential of exposing the county to civil liability to third parties; indeed, the county was the only purported victim of the alleged misuse of public funds. Likewise, a conviction would not have substantially impaired the performance of any essential governmental function. While it is indeed possible, as Guenzel-Handlos suggests, that upon criminal conviction, her removal from office would have disrupted the “smooth operations” of business until a successor was elected, brief for appellant at 15, the same would be true whenever an office is vacated due to death, illness, resignation, or a decision not to seek reelection. Accordingly, we find that the county was not “interested” in the criminal prosecution so as to give rise to a duty to defend under § 23-1201(2). Thus, the alleged “failure” to provide a defense under this statute affords no basis for the claim under the Political Subdivisions Tort Claims Act asserted in the petition as a separately designated “Cause of Action.”

Guenzel-Handlos also argues that the county had a duty to reimburse her legal expenses based upon common-law principles of indemnification. This court has not specifically addressed the question of whether a governmental entity has a common-law duty to indemnify a public official for expenses incurred in the defense of a criminal prosecution. Guenzel-Handlos relies upon *Lomelo v. City of Sunrise*, 423 So. 2d 974 (Fla. App. 1982), in which the court determined that a municipal corporation or other public body has a nondiscretionary common-law duty “to furnish or pay fees for counsel to defend a public official subjected to attack either in civil or criminal proceedings where the conduct complained of arises out of or in connection with the performance of his official duties.” *Id.* at 976. Other courts, however, have held that in the absence of a controlling statute, governmental entities have discretionary authority, but not a duty, to indemnify public officials for legal expenses incurred in defending various legal proceedings. See, e.g., *Hart v. County of*

Sagadahoc, 609 A.2d 282 (Me. 1992), and cases cited therein. See, also, Annot., 47 A.L.R. 5th 553 (1997).

[7,8] The issue presented in this case is not whether the county board *could have* agreed to indemnify Guenzel-Handlos for her legal expenses, but whether it had a duty which *required* it to do so. On the basis of the facts alleged by Guenzel-Handlos, which we take as true for the purpose of judgment on the pleadings, we conclude that no such common-law duty exists. The reimbursement sought in this action would necessarily involve public funds. Public funds cannot be expended for private purposes. *Haman v. Marsh*, 237 Neb. 699, 467 N.W.2d 836 (1991). What constitutes a public purpose, as opposed to a private purpose, is primarily for the Legislature to determine. *Id.*; *State ex rel. Douglas v. Nebraska Mortgage Finance Fund*, 204 Neb. 445, 283 N.W.2d 12 (1979). Inasmuch as counties have only those powers as are granted to them by the Legislature, *State ex rel. Scherer v. Madison Cty. Comrs.*, 247 Neb. 384, 527 N.W.2d 615 (1995), we conclude that rules governing when a county may expend public funds for the defense of a county official in a criminal action should be established by the Legislature, not by the courts.

We note that the Legislature has seen fit to impose a statutory duty upon the Attorney General or his or her designee to “defend all civil and criminal actions instituted against the superintendent or any subordinate officer or employee of the Nebraska State Patrol arising from their employment.” Neb. Rev. Stat. § 81-2009 (Reissue 1999). We cannot ignore the fact that the Legislature has not established a similar unconditional obligation on the part of counties to defend elected officials in criminal prosecutions. The closest parallel is § 23-1201(2), which requires such a defense in some circumstances, but as discussed above, is not applicable in this case because the county was neither a party nor “interested.” Accordingly, we agree with the district court that there is no statutory or common-law duty on the part of the county to indemnify Guenzel-Handlos.

CONCLUSION

Assuming all material facts alleged by Guenzel-Handlos to be true, we conclude, as a matter of law, that the county had no duty

to reimburse her for the legal expenses she incurred in the criminal prosecution. Therefore, the district court did not err in sustaining the county's motion for judgment on the pleadings and dismissing the action. The judgment of dismissal is affirmed.

AFFIRMED.

SPANISH OAKS, INC., AND ROBERT A. WEIGEL, APPELLANTS
AND CROSS-APPELLEES, V. HY-VEE, INC., ET AL.,
APPELLEES AND CROSS-APPELLANTS.

655 N.W.2d 390

Filed January 17, 2003. No. S-02-012.

1. **Declaratory Judgments.** An action for declaratory judgment is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute.
2. **Contracts.** When a dispute sounds in contract, the action is to be treated as one at law.
3. _____. The question of a party's good faith in the performance of a contract is a question of fact.
4. **Declaratory Judgments: Appeal and Error.** Determinations of factual issues in a declaratory judgment action treated as an action at law will not be disturbed on appeal unless they are clearly wrong.
5. **Contracts.** The meaning of a contract, and whether a contract is ambiguous, are questions of law.
6. **Contracts: Public Policy.** The determination of whether a contract violates public policy is a question of law.
7. **Declaratory Judgments: Appeal and Error.** In an appeal from a declaratory judgment, an appellate court, regarding questions of law, has an obligation to reach its conclusion independently of the conclusion reached by the trial court.
8. **Contracts: Parties.** The general rule is that only a party to a contract can challenge its validity.
9. **Landlord and Tenant: Restrictive Covenants: Public Policy.** The parties to a lease may, by express provisions, restrict the uses to which the demised premises may be put, so long as the restriction is reasonable and not contrary to public policy, and a covenant binding the lessee not to carry on a particular business on the leased premises is binding and enforceable.
10. **Restrictive Covenants: Words and Phrases.** A direct restraint on alienation is a provision in a deed, will, contract, or other instrument which, by its express terms, or by implication of fact, purports to prohibit or penalize the exercise of the power of alienation.
11. **Restrictive Covenants.** An indirect restraint on alienation arises when an attempt is made to accomplish some purpose other than the restraint of alienability, but

- with the incidental result that the instrument, if valid, would restrain practical alienability.
12. _____. Indirect, practical restraints on alienation are generally upheld and enforced if they are found reasonably necessary to protect a justifiable or legitimate interest of the parties.
 13. **Contracts: Parties.** The implied covenant of good faith and fair dealing exists in every contract and requires that none of the parties to the contract do anything which will injure the right of another party to receive the benefit of the contract.
 14. **Contracts.** The nature and extent of an implied covenant of good faith and fair dealing is measured in a particular contract by the justifiable expectations of the parties. Where one party acts arbitrarily, capriciously, or unreasonably, that conduct exceeds the justifiable expectations of the second party.
 15. _____. A violation of the covenant of good faith and fair dealing occurs only when a party violates, nullifies, or significantly impairs any benefit of the contract.
 16. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it.
 17. **Contracts.** Extrinsic evidence is not permitted to explain the terms of a contract that is not ambiguous.
 18. **Contracts: Intent.** When a contract is unambiguous, the intentions of the parties must be determined from the contract itself.
 19. **Contracts: Words and Phrases.** A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
 20. **Contracts: Assignments.** An assignee stands in the shoes of the assignor and is bound by the terms of the contract to the same extent as the assignor.
 21. **Leases: Assignments.** The assignment of a lease places the assignee in the same relationship toward the lessor as was occupied by the lessee.
 22. **Contracts.** A contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms.
 23. **Contracts: Appeal and Error.** Although a party may in retrospect be dissatisfied with a bargained-for provision, an appellate court will not rewrite a contract to provide terms contrary to those which are expressed.
 24. **Pleadings.** A pleading has two purposes: (1) to eliminate from consideration contentions which have no legal significance and (2) to guide the parties and the court in the conduct of cases.
 25. _____. Pleadings frame the issues upon which the cause is to be tried and advise the adversary as to what the adversary must meet.
 26. _____. The issues in a given case will be limited to those which are pled.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Affirmed.

Daniel E. Klaus and Carl. J. Sjulín, of Rembolt, Ludtke & Berger, L.L.P., for appellants.

Robert T. Gruit and David D. Zwart, of Baylor, Evnen, Curtiss, Gruit & Witt, L.L.P., for appellees.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, McCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

I. NATURE OF CASE

Spanish Oaks, Inc., is the owner in fee simple of a 7-acre parcel of real property located in Lincoln, Nebraska. Hy-Vee, Inc., is the current lessee of the property. Spanish Oaks, Inc., and its sole stockholder, Robert A. Weigel (collectively Spanish Oaks) seek a declaratory judgment regarding (1) the terms of the lease between Spanish Oaks and Hy-Vee and (2) the validity of a restrictive covenant contained in a sublease from Hy-Vee to Ocho Properties, L.L.C. (Ocho).

II. BACKGROUND

1. FACTUAL BACKGROUND

The original ground lease of this 7-acre property was executed in 1978. Briar West, Inc., leased the property to Commerce Development Associates. The ground lease provided for a 25-year term, with fixed annual rental payments during the base term. When the base term expires, the lessee may extend the ground lease for six periods of 5 years each, with the annual rent to be adjusted at the beginning of each option period, generally based on the assessed value of the property.

The original tenant, Commerce Development Associates, assigned its interest in the ground lease to Safeway, which, in 1982, assigned that interest to Hy-Vee. Hy-Vee took possession of the then-undeveloped property and commenced construction of a building to operate as a supermarket. The fee simple estate was later purchased by Spanish Oaks, after construction of Hy-Vee's supermarket building had commenced. Weigel testified that he reviewed the ground lease prior to the purchase of the property. The Hy-Vee store opened in 1985. In 1986, Hy-Vee sublet a portion of the premises to the Lerner Company (Lerner); Lerner, in turn, sub-sublet those premises and is the landlord for other retail tenants.

Spanish Oaks is a real estate holding development corporation, and Weigel is its sole stockholder and president. Weigel practiced law for several years specializing in commercial real estate and then became involved in commercial real estate development;

Weigel (through different business entities) owns several shopping centers, and the tenants of these centers include grocery stores and other national stores.

Hy-Vee subsequently ceased to operate a supermarket on the premises, opening a new, larger supermarket nearby. In 1998, Hy-Vee subleased its former grocery store and parking lot to Ocho and sold its improvements on the property to Ocho. The Hy-Vee/Ocho sublease contains a use restriction that permits the sublet premises to be used for retail purposes so long as such purposes do not include a mass-merchandise or discount store operation similar to Wal-Mart, Kmart, Target, grocery stores, or stores engaged primarily in the consumer sale of pharmaceuticals. Ocho also sub-sublet its portion of the premises; at the time of trial, a World Gym was operated on the premises, as well as a Burger King.

2. PROCEDURAL BACKGROUND

Spanish Oaks sought a declaratory judgment in the district court regarding the use restriction in the Hy-Vee/Ocho sublease and the rent adjustment provision of the ground lease. Spanish Oaks alleged that the use restriction should be voided because it violates the duty of good faith and fair dealing owed by Hy-Vee to Spanish Oaks, it violates Hy-Vee's duty to develop the property for the mutual benefit of both the landlord and tenant, and it is a restraint on alienation and violates public policy. Spanish Oaks also alleged that the ground lease, which caps the annual rent on the premises at \$90,000 or "thirty percent (30%) of Tenant's annual gross rental receipts from Tenant's subleases, which ever is greater," should be construed to refer not to Hy-Vee's subleases to Ocho and Lerner, but to Ocho and Lerner's sub-subleases to their sub-sublessees.

The district court rejected Spanish Oaks' arguments. The district court concluded that the ground lease was unambiguous, that Hy-Vee was the "[t]enant" of the ground lease, and that the plain language of the contract capped the rent adjustment based only on Hy-Vee's subleases. The district court also determined that the ground lease provided Hy-Vee broad discretion to use the premises as it saw fit and that the use restriction of the Hy-Vee/Ocho sublease was a valid exercise of Hy-Vee's authority.

The district court also noted, in dicta, that there appeared to be a dispute among the parties about when the rent adjustments for the option periods of the ground lease were to go into effect. The district court stated that “[t]he parties have not requested in the pleadings that the court determine when the original lease expires or when the rent adjustments take effect. Therefore, the court does not resolve this dispute.” An examination of the pleadings, pretrial memoranda, and pretrial order reveals no indication that the issue of the expiration date of the base term of the ground lease was ever presented to the district court.

III. ASSIGNMENTS OF ERROR

Spanish Oaks assigns, summarized and restated, that the district court erred in finding (1) that the use restriction of the Hy-Vee/Ocho sublease is valid and enforceable and (2) that the rent adjustment provision of the ground lease was unambiguous and that the term “subleases” does not refer to the subtenants actually occupying the property.

On cross-appeal, Hy-Vee assigns, as restated, that the district court erred in not determining the date of the first rent adjustment and the termination date of the ground lease.

Ocho and Lerner, as appellees, did not file briefs, but have filed statements concurring with the brief filed by Hy-Vee.

IV. STANDARD OF REVIEW

[1,2] An action for declaratory judgment is *sui generis*; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute. *Lake Arrowhead, Inc. v. Jolliffe*, 263 Neb. 354, 639 N.W.2d 905 (2002). When a dispute sounds in contract, the action is to be treated as one at law. *Nebraska Pub. Emp. v. City of Omaha*, 247 Neb. 468, 528 N.W.2d 297 (1995).

[3,4] The question of a party’s good faith in the performance of a contract is a question of fact. *Strategic Staff Mgmt. v. Roseland*, 260 Neb. 682, 619 N.W.2d 230 (2000). Determinations of factual issues in a declaratory judgment action treated as an action at law will not be disturbed on appeal unless they are clearly wrong. See *Woodmen of the World Life Ins. Soc. v. Yelich*, 250 Neb. 345, 549 N.W.2d 172 (1996).

[5-7] The meaning of a contract, and whether a contract is ambiguous, are questions of law. See, *Kosmicki v. State*, 264 Neb. 887, 652 N.W.2d 883 (2002); *Malone v. American Bus. Info.*, 264 Neb. 127, 647 N.W.2d 569 (2002). The determination of whether a contract violates public policy is a question of law. *American Fam. Mut. Ins. Co. v. Hadley*, 264 Neb. 435, 648 N.W.2d 769 (2002). In an appeal from a declaratory judgment, an appellate court, regarding questions of law, has an obligation to reach its conclusion independently of the conclusion reached by the trial court. *DLH, Inc. v. Lancaster Cty. Bd. of Comrs.*, 264 Neb. 358, 648 N.W.2d 277 (2002).

V. ANALYSIS

1. EXCLUSION CLAUSE

(a) Standing

[8] We first note that there is some question whether Spanish Oaks has standing to challenge the use restriction in the Hy-Vee/Ocho sublease. The general rule is that only a party (actual or alleged) to a contract can challenge its validity. *In re Vic Supply Co., Inc.*, 227 F.3d 928 (7th Cir. 2000). “Obviously, the fact that a third party would be better off if a contract were unenforceable does not give him standing to sue to void the contract.” *Id.* at 931.

In this case, however, while Spanish Oaks is not a party to the Hy-Vee/Ocho sublease, Spanish Oaks has standing to challenge the use restriction in the sublease. Spanish Oaks argues that the use restriction constitutes a breach of the covenant of good faith and fair dealing implied by the ground lease; thus, Spanish Oaks is alleging a breach of the ground lease, to which it is a party. Spanish Oaks also claims that the sublease creates a restraint on alienation and that as the fee simple owner of the property, it has standing to raise this claim.

(b) Public Policy

[9] Spanish Oaks argues that the use restriction is a restraint on alienation that is void because it violates public policy. However, it is a well-established general rule that the parties to a lease may, by express provisions, restrict the uses to which the demised premises may be put, so long as the restriction is

reasonable and not contrary to public policy, and a covenant binding the lessee not to carry on a particular business on the leased premises is binding and enforceable. See, e.g., *Vermont Nat. Bank v. Chittenden Trust Co.*, 143 Vt. 257, 465 A.2d 284 (1983); *Brookings Mall, Inc. v. Cpt. Ahab's, Ltd.*, 300 N.W.2d 259 (S.D. 1980); *Whitinsville Plaza, Inc. v. Kotseas*, 378 Mass. 85, 390 N.E.2d 243 (1979); *Elida, Inc. v. Harmor Realty Corporation*, 177 Conn. 218, 413 A.2d 1226 (1979); *Tullier v. Tanson Enterprises, Inc.*, 367 So. 2d 773 (La. 1979); *Pitts v. Housing Auth.*, 160 Ohio St. 129, 113 N.E.2d 869 (1953); *Neiman-Marcus Company v. Hexter*, 412 S.W.2d 915 (Tex. Civ. App. 1967). See, generally, 42 Am. Jur. 2d *Landlord and Tenant* § 505 (1995 & Supp. 2002). This court so held in *Herpolsheimer v. Funke*, 1 Neb. (Unoff.) 304, 95 N.W. 687 (1901). Cf. *Wittenberg v. Mollyneaux*, 60 Neb. 583, 83 N.W. 842 (1900) (partial restraints upon exercise of business, trade, or profession are reasonable when ancillary to purchase of property, made in good faith, and necessary to afford fair protection to purchaser).

Spanish Oaks contends that the use restriction is against public policy because it is a restraint on alienation. Spanish Oaks adduced evidence generally indicating that the use restriction depressed the value of Spanish Oaks' fee simple estate by reducing the income-generating potential of the property to the fee simple owner. Spanish Oaks relies on this court's statement, first made in *Cast v. National Bank of Commerce T. & S. Assn.*, 186 Neb. 385, 391, 183 N.W.2d 485, 490 (1971), that "'[a]ny provision in a deed, will, contract, or other legal instrument which, if valid, would tend to impair the marketability of property, is a restraint on alienation.'" Accord, *State v. Union Pacific RR. Co.*, 241 Neb. 675, 490 N.W.2d 461 (1992), *modified* 242 Neb. 97, 490 N.W.2d 461; *Newman v. Hinky Dinky*, 229 Neb. 382, 427 N.W.2d 50 (1988) (in dicta).

However, this court later criticized *Cast*, *supra*, in *Occidental Sav. & Loan Assn. v. Venco Partnership*, 206 Neb. 469, 293 N.W.2d 843 (1980). In *Venco Partnership*, the appellant argued that a "due on sale" clause in a mortgage was void as an indirect restraint on alienation, because the possibility of acceleration of the mortgage might impair the owner from being able to sell the

property as he or she wished. We rejected the appellant's reliance on our holding in *Cast*, stating:

Whatever an indirect restraint on alienation as envisioned by us in *Cast* may be, a "due on sale" clause in a mortgage does not fall within that category. We perhaps were overly generous in our statement in *Cast* that "[a]ny provision . . . which, if valid, would tend to impair the marketability of property, is a restraint on alienation." *Id.* . . . [S]ome covenants may impair the marketability of property and yet not be restraints on alienation, direct or indirect, as that concept is known in the law. *As an example, a covenant in a deed that requires the dedication of property solely to residential purposes is not a restraint on alienation even if the owner could sell the property at a higher price for commercial purposes.* The most that need be said about *Cast* is that the restriction in question affected the validity of title and totally precluded the fee title owner from transferring title for a period of 25 years. There is no similarity between the language of the will in the *Cast* case and a common "due on sale" clause in a mortgage.

The difficulty in attempting to determine the validity of a contract based upon some notion of an indirect restraint on alienation and a concept of "practical inalienability" is that there is no framework within which a court may operate. Parties to a contract can never know, absent litigation, whether the contract is valid or not. Such a result is undesirable and should be avoided if possible.

(Emphasis supplied.) *Venco Partnership*, 206 Neb. at 474-75, 293 N.W.2d at 846. See, also, *Falls City v. Missouri Pacific Railroad Company*, 453 F.2d 771 (8th Cir. 1971) (interpreting *Cast*, *supra*, as precluding unreasonable limitations on number of persons to whom property can be sold, but not conditions on use of property). In *Venco Partnership*, *supra*, we criticized the broad language of our prior holding in *Cast*, *supra*, distinguished it factually, and clearly stated that "not every impediment to a sale is a restraint on alienation, let alone contrary to public policy." *Venco Partnership*, 206 Neb. at 473, 293 N.W.2d at 845.

[10,11] At worst, the use restriction in the Hy-Vee/Ocho sublease could be described as an indirect, practical restraint on

alienation, as opposed to a direct restraint. A direct restraint on alienation is a provision in a deed, will, contract, or other instrument which, by its express terms, or by implication of fact, purports to prohibit or penalize the exercise of the power of alienation. See, e.g., *Carma Developers v. Marathon Dev. Cal.*, 2 Cal. 4th 342, 826 P.2d 710, 6 Cal. Rptr. 2d 467 (1992); *Pritchett v. Turner*, 437 So. 2d 104 (Ala. 1983). See, generally, Michael D. Kirby, *Restraints on Alienation: Placing a 13th Century Doctrine in 21st Century Perspective*, 40 Baylor L. Rev. 413 (1988). An indirect restraint on alienation arises when an attempt is made to accomplish some purpose other than the restraint of alienability, but with the incidental result that the instrument, if valid, would restrain practical alienability. See, *Carma Developers*, *supra*; *Pritchett*, *supra*; *Redd v. Western Sav. & Loan Co.*, 646 P.2d 761 (Utah 1982); *Lipps v. First American Serv. Corp.*, 223 Va. 131, 286 S.E.2d 215 (1982); *Crockett v. Savings & Loan Assoc.*, 289 N.C. 620, 224 S.E.2d 580 (1976).

[12] Indirect restraints historically have been restricted by the rule against perpetuities and related rules and have not been as harshly struck down as the classical direct restraints. *Crockett*, *supra*. Courts generally have upheld and enforced such nonclassical restraints if they are found reasonably necessary to protect a justifiable or legitimate interest of the parties. See *Redd*, *supra*. Cf. Restatement (Third) of Property: Servitudes § 3.5 at 461 (2000) (“[a]n otherwise valid servitude is valid even if it indirectly restrains alienation by limiting the use that can be made of property, by reducing the amount realizable by the owner on sale or other transfer of the property . . .”).

This court’s decision in *Occidental Sav. & Loan Assn. v. Venco Partnership*, 206 Neb. 469, 293 N.W.2d 843 (1980), reflects application of the foregoing principles. In *Venco Partnership*, 206 Neb. at 477, 293 N.W.2d at 847, we specifically rejected the notion that an indirect, practical restraint on alienation is found simply because a “market hindrance” may make buyers less willing to purchase property at a premium. Despite this court’s subsequent references to the disapproved language of *Cast v. National Bank of Commerce T. & S. Assn.*, 186 Neb. 385, 183 N.W.2d 485 (1971), see, *State v. Union Pacific RR. Co.*, 241 Neb. 675, 490 N.W.2d 461 (1992), *modified* 242 Neb. 97, 490 N.W.2d

461, and *Newman v. Hinky Dinky*, 229 Neb. 382, 427 N.W.2d 50 (1988) (in dicta), *Venco Partnership, supra*, correctly sets forth and applies the law regarding indirect restraints on alienation.

We now apply those principles to the instant case. Pursuant to *Venco Partnership*, the threshold question is not whether an indirect restraint on alienation is reasonable, but whether the challenged instrument is a restraint on alienation at all. We conclude that, even assuming that the use restriction at issue in this case creates a practical impairment to the marketability of the property, it is not an indirect restraint on alienation. Hy-Vee cannot restrict or prohibit the sale of Spanish Oaks' interest in the property, and Spanish Oaks is free to sell or hold the property as it sees fit. Despite a possible reduction in market price, Spanish Oaks still has both the legal and practical ability to alienate its interest in the property. This situation does not resemble a restraint on alienation of the kind that courts have generally refused to uphold and enforce. Compare *Rich, Rich & Nance v. Carolina Const. Corp.*, 355 N.C. 190, 558 S.E.2d 77 (2002).

Spanish Oaks complains not about a restriction on its ability to sell its property, but about the price it will receive because it is subject to the ground lease and subleases. Compare *Kleinheider v. Phillips Pipe Line Co.*, 528 F.2d 837 (8th Cir. 1975). The difficulty with this complaint is that many transactions, instruments, and encumbrances can arguably reduce the market value of property. Were we to accept Spanish Oaks' argument, for instance, the ground lease might be voidable, as the marketability of the property would certainly be greater if Spanish Oaks' fee simple estate was unencumbered by Hy-Vee's leasehold. "Certainly courts should not get caught in that thicket." *Venco Partnership*, 206 Neb. at 478, 293 N.W.2d at 848.

Even assuming that the potential market value of Spanish Oaks' fee simple interest is in some way diminished by the presence of the use restriction, that does not make the use restriction an indirect restraint on alienation as that concept is understood in the law. The contention that the use restriction constitutes an unreasonable restraint on alienation is without merit.

(c) Good Faith and Fair Dealing

[13] Spanish Oaks also contends that the use restriction of the Hy-Vee/Ocho sublease breaches the implied duty of good faith and fair dealing owed by Hy-Vee to Spanish Oaks by virtue of the ground lease. The implied covenant of good faith and fair dealing exists in every contract and requires that none of the parties to the contract do anything which will injure the right of another party to receive the benefit of the contract. *Reichert v. Rubloff Hammond, L.L.C.*, 264 Neb. 16, 645 N.W.2d 519 (2002). See, also, Restatement (Second) of Contracts § 205 (1981); Steven J. Burton & Eric G. Andersen, *Contractual Good Faith* (1995).

[14,15] However, the nature and extent of an implied covenant of good faith and fair dealing is measured in a particular contract by the justifiable expectations of the parties. Where one party acts arbitrarily, capriciously, or unreasonably, that conduct exceeds the justifiable expectations of the second party. *Dunfee v. Baskin-Robbins, Inc.*, 221 Mont. 447, 720 P.2d 1148 (1986), cited with approval, *Cimino v. FirstTier Bank*, 247 Neb. 797, 530 N.W.2d 606 (1995). A violation of the covenant of good faith and fair dealing occurs only when a party violates, nullifies, or significantly impairs any benefit of the contract. See *Idaho Power Co. v. Cogeneration, Inc.*, 134 Idaho 738, 9 P.3d 1204 (2000). The scope of conduct prohibited by the covenant of good faith is circumscribed by the purposes and express terms of the contract. *Carma Developers v. Marathon Dev. Cal.*, 2 Cal. 4th 342, 826 P.2d 710, 6 Cal. Rptr. 2d 467 (1992). The implied covenant of good faith is read into contracts in order to protect the express covenants or promises of the contract, not to protect some general public policy interest not directly tied to the contract's purpose. *Id.*

In this case, then, the appropriate inquiry is whether the existence of the use restriction in the Hy-Vee/Ocho sublease exceeds the justifiable expectations of the parties to the ground lease and violates, nullifies, or significantly impairs Spanish Oaks' benefit of the contract. As noted by the district court, the ground lease contains no restrictions on Hy-Vee's use of the premises and permits Hy-Vee to "sublet all or any portion of the Premises or the improvements thereon without obtaining the consent of the Landlord." The parties to the ground lease could have included

express provisions governing the tenant's use or subletting of the property, yet chose not to do so. The parties obviously contemplated that the tenant might sublet the premises, yet no provision was made for use restrictions in the subleases despite the commercial prevalence of such restrictions in shopping center leases. See, generally, Annot., 1 A.L.R.4th 942 (1980). Nor was there evidence to suggest that Hy-Vee acted in bad faith to deliberately interfere with Spanish Oaks' benefits under the ground lease; rather, it is apparent that Hy-Vee's inclusion of the use restriction in its subleases is intended to protect Hy-Vee's commercial interests, and any effect on Spanish Oaks is incidental.

The evidence also conflicts regarding the degree to which Spanish Oaks has been deprived of the benefit of the ground lease by the existence of the use restriction. Spanish Oaks does not contend that since acquiring the property, Spanish Oaks has not received the rent payments specified for the base term of the ground lease. Hy-Vee also adduced evidence that the structure on the property was not large enough to accommodate the retailers that Spanish Oaks contended would be ideal for the property, such as Kmart, Target, or ShopKo. Hy-Vee's vice president testified that Hy-Vee moved to its new location because it was unable to expand its previous store on the property to the size Hy-Vee felt was necessary to be competitive.

Spanish Oaks' expert witness also admitted that several other potential retail tenants for the property would not be precluded from locating there by the terms of the use restriction: restaurants, Hobby Lobby, office supply stores such as Office Max or Office Depot, hardware stores such as Westlake Hardware, clothing stores such as Kohl's, Best Buy, or large bookstores such as Barnes & Noble. The managing partner of Ocho testified that the use restriction had not negatively affected the income stream from the property. Thus, despite Spanish Oaks' contention that the use restriction "destroys" the shopping center, the evidence does not show that the use restriction completely deprives Spanish Oaks of the benefits of the ground lease.

Given these circumstances, we cannot say that the district court was clearly wrong in determining that Hy-Vee did not breach the implied covenant of good faith and fair dealing contained in the ground lease. The evidence supports the conclusions that the use

restriction does not violate the reasonable expectations of the original parties to the ground lease and that Hy-Vee has not violated, nullified, or significantly impaired any of Spanish Oaks' benefits under the ground lease. Spanish Oaks' dissatisfaction with the express terms of the ground lease is insufficient to prove that Hy-Vee has acted unfairly or in bad faith.

In arguing to the contrary, Spanish Oaks relies on *George v. Jones*, 168 Neb. 149, 95 N.W.2d 609 (1959). In that case, the lessor sought forfeiture of a mineral lease where the rent was based on the amount of gravel extracted from the property, but the lessee did not work the land with ordinary diligence. We held that where rent under a mineral or mining lease is based on a royalty on the product of the lease, there is an implied covenant on the lessee's part to work the mine with ordinary diligence, so that the lessor may secure the actual consideration for the lease. *Id.* While *George* was analyzed in the specific context of a mineral lease, it is evident that the principles at work in *George* make that case a specific example of the broader covenant of good faith and fair dealing discussed above. Spanish Oaks argues that *George* requires Hy-Vee to develop the premises devised by the ground lease for the mutual benefit of the tenant and landlord.

However, *George, supra*, is readily distinguishable, as noted by the district court, in that the rent under the ground lease in this case is not based on a percentage or royalty, as was the lease in *George*. Even in cases involving commercial percentage leases, it has generally been held that actions which reduce the actual rent received by the lessor do not violate the covenant of good faith and fair dealing where the lessee did not act to intentionally bring down gross receipts at the leased premises, but instead acted for reasonable commercial purposes. See, generally, Steven J. Burton & Eric G. Andersen, Contractual Good Faith § 2.3.3 (1995). The determinative factor in *George, supra*, was that the lessor in that case was wholly deprived of the consideration bargained for under the lease. As noted above, no such circumstance is presented in this case. *George* does not support the position advanced by Spanish Oaks.

Spanish Oaks also argues, briefly, that the use restriction violates the express terms of the ground lease because the ground lease contemplates the development of a "'shopping center,'"

and “one cannot ‘shop’ for anything at a World Gym [or] Burger King.” Brief for appellants at 22. Even assuming, for the sake of argument, that Spanish Oaks’ interpretation of the term “shopping center” is correct, Spanish Oaks’ argument has no relevance to the use restriction, which does not compel the presence of World Gym or Burger King. Rather, as demonstrated by the examples set forth above, the use restriction precludes certain particular kinds of retail activity, but does not bar all businesses at which a consumer could “shop” within Spanish Oaks’ suggested understanding of the term.

[16] Spanish Oaks’ arguments regarding the use restriction are without merit. The district court did not err in concluding that the use restriction in the Hy-Vee/Ocho sublease is not void for any of the reasons suggested by Spanish Oaks. The district court also concluded that Spanish Oaks was estopped from challenging the use restriction; given our resolution of the other issues presented, we do not reach Spanish Oaks’ claims of error regarding the district court’s estoppel determination. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it. *Rush v. Wilder*, 263 Neb. 910, 644 N.W.2d 151 (2002).

2. RENT ADJUSTMENT PROVISION

As noted previously, the ground lease provides for several extension periods and also provides for adjustment of the annual rent for each extension period based on a percentage of the fair market value of the premises. However, the ground lease also provides in relevant part:

In no event shall the annual rent be adjusted below Sixty Thousand Dollars (\$60,000.00) per year, and in no event shall the annual rent be adjusted above Ninety Thousand Dollars (\$90,000.00) per year or *thirty per cent (30%) of Tenant’s annual gross rental receipts from Tenant’s subleases*, which ever is greater.

(Emphasis supplied.) Spanish Oaks argues that this provision is ambiguous and should be construed to refer to the sub-subleases between Hy-Vee’s sublessees and the tenants who actually occupy the premises.

To this end, Spanish Oaks adduced evidence generally indicating that when the ground lease was executed, the original

parties to the ground lease expected there to be only one level of subleases, i.e., that the original lessee of the premises would sublease the premises to a retail occupant. Thus, argues Spanish Oaks, the above-quoted language of the rent adjustment provision was intended to limit the annual rent under the ground lease based on the rental receipts from the occupying tenants of the property, i.e., the businesses that have sublet the premises from Ocho and Lerner.

[17-19] The district court, however, did not consider Spanish Oaks' parol evidence, as the district court determined that the rent adjustment provision is unambiguous. Extrinsic evidence is not permitted to explain the terms of a contract that is not ambiguous. *McDonald's Corp. v. Goler*, 251 Neb. 934, 560 N.W.2d 458 (1997). When a contract is unambiguous, the intentions of the parties must be determined from the contract itself. *Ruble v. Reich*, 259 Neb. 658, 611 N.W.2d 844 (2000). A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. *Malone v. American Bus. Info.*, 264 Neb. 127, 647 N.W.2d 569 (2002).

[20,21] In this case, however, the contractual provision at issue is susceptible to only one reasonable meaning. It is well-established that an assignee stands in the shoes of the assignor and is bound by the terms of the contract to the same extent as the assignor. *Vowers & Sons, Inc. v. Strasheim*, 248 Neb. 699, 538 N.W.2d 756 (1995). The assignment of a lease places the assignee in the same relationship toward the lessor as was occupied by the lessee. See *Beltner v. Carlson*, 153 Neb. 797, 46 N.W.2d 153 (1951). Thus, the current parties to the lease, Spanish Oaks and Hy-Vee, are respectively the "Landlord" and "Tenant" described in the ground lease. The "Tenant's annual gross rental receipts from Tenant's subleases" can refer only to Hy-Vee's annual gross rental receipts from Hy-Vee's subleases, which are currently to Ocho and Lerner.

[22,23] A contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms. *Ruble, supra*. Spanish Oaks' extrinsic evidence cannot be used to create ambiguity where the terms of the contract are clear and unambiguous. Although a

party may in retrospect be dissatisfied with a bargained-for provision, an appellate court will not rewrite a contract to provide terms contrary to those which are expressed. *Reichert v. Rubloff Hammond, L.L.C.*, 264 Neb. 16, 645 N.W.2d 519 (2002). The district court correctly determined that the ground lease is unambiguous and that the “Tenant’s annual gross rental receipts from Tenant’s subleases” refer to Hy-Vee’s subleases with its sublessees, Ocho and Lerner. Spanish Oaks’ assignments of error to the contrary are without merit.

3. CROSS-APPEAL

As previously mentioned, in its order, the district court noted a dispute among the parties about when the original term of the ground lease was to expire and when the rent adjustments for the option periods of the ground lease were to go into effect, but the district court did not resolve that issue because it was not presented by the pleadings. On cross-appeal, Hy-Vee argues that the district court erred by abstaining on the issue.

Hy-Vee’s basic argument is that the district court should have resolved this issue in order to avoid further litigation and promote judicial economy. Hy-Vee contends that “[i]t does little good for the Court to resolve the issue regarding calculating the rent adjustment without deciding when the first rent adjustment will occur.” Brief for appellee on cross-appeal at 37.

However, Hy-Vee does not contest the district court’s conclusion that this issue was not presented to the district court through the pleadings, and our examination of the record reveals no indication in the pleadings, pretrial memoranda, or pretrial order that this issue was ever presented to the district court for disposition. In fact, there is little indication that the parties were aware of the discrepancy in their positions until it was called to their attention by the district court.

[24-26] A pleading has two purposes: (1) to eliminate from consideration contentions which have no legal significance and (2) to guide the parties and the court in the conduct of cases. *Cotton v. Ostroski*, 250 Neb. 911, 554 N.W.2d 130 (1996). Pleadings frame the issues upon which the cause is to be tried and advise the adversary as to what the adversary must meet. *Bakody Homes & Dev. v. City of Omaha*, 246 Neb. 1, 516 N.W.2d 244

(1994). The issues in a given case will be limited to those which are pled. *Wilcox v. City of McCook*, 262 Neb. 696, 634 N.W.2d 486 (2001).

While we recognize that judicial efficiency might be promoted if courts were to, *sua sponte*, determine questions raised by the facts but not presented in the pleadings, that efficiency would come at the expense of due process. Hy-Vee argues, in essence, that the district court erred by not deciding an issue of which the parties had no notice, and regarding which they did not have an opportunity to be heard. But see *In re Application No. C-1889*, 264 Neb. 167, 647 N.W.2d 45 (2002) (procedural due process requires that parties whose rights are to be affected are entitled to notice and opportunity to be heard). We conclude that the district court did not err by declining to address an issue that was not pled by the parties or presented to the district court for disposition.

VI. CONCLUSION

The district court did not err in determining that the use restriction was not a restraint on alienation and was not clearly wrong in finding that the use restriction did not constitute a breach of the covenant of good faith and fair dealing implied in the ground lease. The district court did not err in concluding that the rent adjustment provision was unambiguous or in declining to address the issue of when the rent adjustment provision becomes effective. For these reasons, we affirm the judgment of the district court.

AFFIRMED.

IN RE INTEREST OF TY M. AND DEVON M.,
CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLEE, V.
SHAWN M., APPELLANT, AND HOLLY M.,
APPELLEE AND CROSS-APPELLANT.
655 N.W.2d 672

Filed January 17, 2003. No. S-02-056.

1. **Juvenile Courts: Parental Rights: Appeal and Error.** In an appeal from an order terminating parental rights, an appellate court tries factual questions de novo on the record. Appellate review is independent of the juvenile court's findings. However, when the evidence is in conflict, an appellate court may give weight to the fact that the juvenile court observed the witnesses and accepted one version of facts over another.
2. **Juvenile Courts: Appeal and Error.** In reviewing questions of law arising under the Nebraska Juvenile Code, an appellate court reaches conclusions independent of the lower court's ruling.
3. **Constitutional Law: Due Process.** Procedural due process includes notice to the person whose right is affected by the proceeding; reasonable opportunity to refute or defend against the charge or accusation; reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation; representation by counsel, when such representation is required by the Constitution or statutes; and a hearing before an impartial decisionmaker.
4. **Records: Appeal and Error.** It is the responsibility of the party appealing to provide a record which supports the claimed errors.
5. **Juvenile Courts: Appeal and Error.** A proceeding before a juvenile court is a "special proceeding" for appellate purposes.
6. **Juvenile Courts: Parental Rights: Final Orders: Appeal and Error.** A judicial determination made following an adjudication in a special proceeding which affects the substantial right of parents to raise their children is a final, appealable order.
7. ____: ____: ____: _____. A dispositional order imposing a rehabilitation plan for parents in a juvenile case is a final, appealable order.
8. **Juvenile Courts: Parental Rights: Jurisdiction: Appeal and Error.** In the absence of a direct appeal from an adjudication order, a parent may not question the existence of facts upon which the juvenile court asserted jurisdiction.
9. **Parental Rights: Evidence: Proof.** In order to terminate parental rights, the State must prove by clear and convincing evidence that one of the statutory grounds enumerated in Neb. Rev. Stat. § 43-292 (Reissue 1998) exists *and* that termination is in the children's best interests.
10. **Juvenile Courts: Parental Rights.** The purpose of Neb. Rev. Stat. § 43-292(6) (Reissue 1998) is to advance the best interests of the children by giving the juvenile court power to terminate parental rights where the grounds for adjudicating the children within Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1998) have not been corrected.
11. ____: _____. Where the failure of a parent to comply with a rehabilitation plan is an independent ground for termination of parental rights, the rehabilitation plan

must be conducted under the direction of the juvenile court and must be reasonably related to the objective of reuniting parent with child.

12. **Parental Rights.** Once a plan of reunification has been ordered to correct the conditions underlying the adjudication under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1998), the plan must be reasonably related to the objective of reuniting the parents with the children.
13. **Juvenile Courts: Parental Rights: Evidence.** A juvenile court is not limited to reviewing the efforts of a parent under the plan last ordered by the court; rather, the court looks at the entire reunification program and the parent's compliance with the various plans involved in the program, as well as any effort not contained within the program which would bring the parent closer to reunification.
14. **Juvenile Courts: Parental Rights: Final Orders: Appeal and Error.** A detention order issued under Neb. Rev. Stat. §§ 43-247(3)(a) and 43-254 (Reissue 1998) after a hearing which continues to withhold the custody of a juvenile from the parent pending an adjudication hearing to determine whether the juvenile is neglected is a final order and thus appealable.
15. **Parental Rights: Trial: Rules of Evidence.** Reports may not be received in evidence for the purpose of a termination proceeding, nor relied upon by the court, unless they have been admitted without objection or brought within the provisions of Neb. Evid. R. 803(23), Neb. Rev. Stat. § 27-803(23) (Cum. Supp. 2002), an exception to the hearsay rule.
16. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.
17. **Evidence: Presumptions.** Absent a showing to the contrary, it is presumed that the trial court disregarded all incompetent and irrelevant evidence.
18. **Juvenile Courts: Parental Rights: Evidence: Appeal and Error.** The improper admission of evidence by a juvenile court in a parental rights termination proceeding does not, in and of itself, constitute reversible error; a showing of prejudice must be made.
19. **Parental Rights: Evidence: Appeal and Error.** Factual questions concerning a judgment or order terminating parental rights are tried by an appellate court de novo on the record, and impermissible or improper evidence is not considered by the appellate court.
20. ____: ____: ____: In an appeal from a judgment or order terminating parental rights, an appellate court, in a trial de novo on the record and disregarding impermissible or improper evidence, determines whether there is clear and convincing evidence to justify termination of parental rights under the Nebraska Juvenile Code.
21. **Records: Judicial Notice: Rules of Evidence.** As a subject for judicial notice, existence of court records and certain judicial action reflected in a court's record are, in accordance with Neb. Evid. R. 201(2)(b), Neb. Rev. Stat. § 27-201(2)(b) (Reissue 1995), facts which are capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned.
22. **Juvenile Courts: Judicial Notice: Records.** A juvenile court has a right to examine its own records and take judicial notice of its own proceedings and judgment in an interwoven and dependent controversy where the same matters have already been considered and determined.

23. **Parental Rights.** Children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity.

Appeal from the County Court for Dodge County: DANIEL J. BECKWITH, Judge. Affirmed.

Avis R. Andrews for appellant.

Pamela Lynn Hopkins for appellee Holly M.

Don Stenberg, Attorney General, and Stuart B. Mills, Special Prosecutor, for appellee State of Nebraska.

Leta F. Fornoff, guardian ad litem.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, McCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

NATURE OF CASE

Shawn M. and Holly M. each appeal from a judgment of the county court for Dodge County, sitting as a juvenile court, which terminated their parental rights to Ty M., born March 23, 1997, and Devon M., born June 10, 1998.

SCOPE OF REVIEW

[1] In an appeal from an order terminating parental rights, an appellate court tries factual questions de novo on the record. Appellate review is independent of the juvenile court's findings. However, when the evidence is in conflict, an appellate court may give weight to the fact that the juvenile court observed the witnesses and accepted one version of facts over another. *In re Interest of DeWayne G. & Devon G.*, 263 Neb. 43, 638 N.W.2d 510 (2002).

[2] In reviewing questions of law arising under the Nebraska Juvenile Code, an appellate court reaches conclusions independent of the lower court's ruling. *In re Interest of Chad S.*, 263 Neb. 184, 639 N.W.2d 84 (2002).

FACTS

Ty and Devon were placed in the care, custody, and control of the Nebraska Department of Health and Human Services (DHHS)

on November 20, 1998, after police were sent to the home to investigate a report that the children were in danger based on neglect. At the time, Ty was approximately 1½ years old and Devon was approximately 5 months old.

The children were with a babysitter when police arrived. The living room floor was nearly covered with toys, dirty clothing, food, cigarette butts, and garbage. Bottles found in the home contained spoiled formula or milk, and there were feces stains on the carpet. Holes had been punched through two doors. Soiled dishes were piled high in the kitchen, and no clean dishes were found. The children's room had a strong odor of urine and spoiled formula or milk. The sheets and pillowcases in the children's room had dried vomit and urine on them.

Although the parents had been counseled not to smoke because Devon has reactive airway disease, there was a strong odor of tobacco in the home. An apparatus for giving Devon breathing treatments was filthy and unusable, and there was no medication for the machine in the home.

The children were initially placed with Shawn's parents until December 7, 1998, when they were returned to the parental home. The children were again removed from the home on February 3, 1999, and placed with the grandparents until October 1, when they were placed in foster care.

The children were adjudicated under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1998) on March 24, 1999, in relation to Holly, at which time she admitted the allegations in the petition. Following a hearing on April 14, the children were adjudicated in relation to Shawn.

Between April 20, 1999, and January 16, 2001, six case plans were received and reviewed by the juvenile court. The case plans spelled out a number of goals for both parents, including marital counseling, mental health counseling, anger management skills, domestic violence counseling, parenting skills, and finances.

A petition to terminate parental rights was filed on February 27, 2001. The petition alleged that grounds for termination existed under Neb. Rev. Stat. § 43-292(6) (Reissue 1998) because (1) the children had been determined to be children under § 43-247(3)(a) and (2) following that determination, reasonable efforts had been made to preserve and reunify the

family, and the efforts had failed to correct the conditions which led to that determination. The petition also alleged that grounds for termination existed under § 43-292(7) and that termination would be in the best interests of the children, who had been in out-of-home placement for 15 or more of the most recent 22 months.

An amended petition to terminate parental rights alleged that the parents failed to maintain adequate housing for themselves and their children from February 1999 to October 2000; the parents failed to demonstrate proper and consistent parenting skills during supervised visitations despite family support services, parenting classes, and supervised visitation; the parents failed to follow through with recommendations of mental health providers; and the parents failed to maintain a stable relationship.

On January 8, 2002, the juvenile court entered an order terminating parental rights. The court found that the adjudication under § 43-247(3)(a) “acknowledges that there are collective conditions which lead to a very filthy health hazard environment making conditions unsafe and unsanitary.” The court further found that the State had maintained ongoing, continuing, and reasonable efforts to sustain and keep the family together, including ongoing visitation plans.

The juvenile court found an ongoing level of deterioration within the home, including lack of parenting skills, lack of awareness and sensitivity to the children and their needs, and marital strife and conflict. Holly had reported violence and a feeling of fear to her DHHS caseworker and other professionals. She stated that she was unable to meet the needs of her children and that she feared for her children’s safety with Shawn. The court found that Holly’s admissions of domestic violence to DHHS professionals were consistent with the evidence and that Holly had on many occasions indicated her intent to divorce Shawn.

The juvenile court noted that Shawn was in jail from October 1999 through October 2000, after which he reunited with Holly. At the time of the court order, they were living in a home provided by Shawn’s parents. During Shawn’s incarceration, he did not follow through with required levels of counseling and parenting classes. He sporadically participated in a men’s group after his

release, but the court found that neither parent maintained involvement in individual counseling or fully utilized the available opportunities, despite the family support workers' efforts and DHHS resources.

During ongoing visitations, both parents demonstrated an inability to control the children. The juvenile court found that neither parent consistently recognized safety issues regarding the children. Holly failed to timely follow through with her psychological evaluations and to take her medication for depression.

The juvenile court concluded that the rehabilitation plans ordered by the court were designed to correct the unsafe conditions in the home and that these unsafe and unsanitary conditions reflected problems with parenting skills, with domestic violence, and with recognizing the needs of the children. The court found that the parents consistently failed to comply with reasonable steps for rehabilitation as ordered by the court by failing to attend individual counseling, address spousal violence, or demonstrate proper parenting skills during visitations. The evidence showed that DHHS provided multiple resources and services for both Shawn and Holly, but neither showed an ability or consistent commitment and willingness to succeed. The parents had been unable to make satisfactory progress toward reunification.

The juvenile court found that the evidence supported termination of parental rights under § 43-292(6) in that the parents had been provided many reasonable opportunities to rehabilitate and had failed to do so. Shawn and Holly willfully failed to comply in whole or in part with the material provisions of the rehabilitation plans, including failure to demonstrate proper parenting skills and failure to keep the children reasonably safe during visitations. The parents also demonstrated lack of followthrough with individual therapy and did not address domestic violence issues. The children had been in out-of-home placement for 15 or more of the most recent 22 months, specifically since February 3, 1999. The court found clear and convincing evidence that it is in the best interests of the children to terminate the parental rights. The court ordered custody of the children to remain with DHHS for appropriate placement with the objective of adoption.

ASSIGNMENTS OF ERROR

Shawn and Holly have each assigned numerous errors covering a variety of issues. However, because a number of the assigned errors are not argued in the parties' briefs, we will not address them. See *Caruso v. Parkos*, 262 Neb. 961, 637 N.W.2d 351 (2002). We will address only the alleged errors as summarized and restated here: (1) The juvenile court erred in "failing to enforce" the parties' due process rights and constitutional rights, (2) the court erred in finding that it is in the best interests of the children that the parents' rights be terminated, (3) the court erred in overruling Holly's motion to strike, (4) the court erred in overruling the motions for psychological and psychiatric evaluations of the children, (5) the court erred in admitting certified court documents, (6) the court erred in finding that reasonable efforts had been made to preserve and reunify the family, and (7) the court erred in failing to find § 43-292(7) unconstitutional.

ANALYSIS

In an appeal from an order terminating parental rights, an appellate court tries factual questions de novo on the record. Appellate review is independent of the juvenile court's findings. However, when the evidence is in conflict, an appellate court may give weight to the fact that the juvenile court observed the witnesses and accepted one version of facts over another. *In re Interest of DeWayne G. & Devon G.*, 263 Neb. 43, 638 N.W.2d 510 (2002). In reviewing questions of law arising under the Nebraska Juvenile Code, an appellate court reaches conclusions independent of the lower court's ruling. *In re Interest of Chad S.*, 263 Neb. 184, 639 N.W.2d 84 (2002). We find no merit to any of the assigned errors and hold that the juvenile court's order should be affirmed.

DUE PROCESS RIGHTS

Both parents claim that their due process rights were violated at some point during the termination proceedings. In summary, Shawn claims that he was denied due process in that for 2 years following the adjudication, he had no procedural notice that the children were in custody for any other reason than the fact that the house was unsafe and unsanitary. The parties stipulated that the cleanliness of the home was no longer an issue after September

2000, and based upon the stipulation, Shawn claims that the condition of the house was not an issue for 1 full year prior to the hearing on termination. He claims that the termination proceeding exceeded the juvenile petition by adding that the parents had failed to maintain adequate housing for themselves, failed to demonstrate proper and consistent parenting skills during supervised visitation, failed to follow through with recommendations of mental health providers, and failed to maintain a stable relationship. He asserts there was no evidence to show that the parents were ever advised prior to the filing of the petition for termination of parental rights that their parental rights could in fact be terminated. He also claims that there was no adequate advisement of rights made by the juvenile court prior to the adjudication, as required by Neb. Rev. Stat. § 43-279.01 (Reissue 1998). In addition, he claims that his due process rights were violated because the court failed to properly advise the parents of their rights and possible consequences of the State's petition during the adjudication process. Finally, Shawn argues that his due process rights were violated when he was not given the opportunity to challenge the evidence, which included extensive hearsay and evidence which lacked foundation.

In summary, Holly asserts that since the adjudication was made on the basis that the house was dirty, evidence regarding termination as to any factor other than the improvement or lack of improvement in the cleanliness of the house was irrelevant for purposes of termination of parental rights. Holly claims that the parents repeatedly attempted to exercise their rights through motions to strike, motions in limine, and motions to bifurcate, and through relevancy and material objections, which were all overruled.

Holly further claims that the juvenile court failed to obtain original jurisdiction under the adjudication and that, therefore, the court had no jurisdiction to enter subsequent case plans or to proceed to a termination based on § 43-292(6) or (7). She asserts that the parents were not advised of their rights at the adjudication as required by § 43-279.01. She also argues that the adjudication was based on the condition of the house and that any case plans which addressed other issues are irrelevant and therefore cannot supply a basis for termination proceedings.

[3] In *In re Interest of Kantril P. & Chenelle P.*, 257 Neb. 450, 459, 598 N.W.2d 729, 737 (1999), we addressed the due process rights of parents in termination proceedings and the importance of those rights: “[S]tate intervention to terminate the parent-child relationship must be accomplished by procedures meeting the requisites of the Due Process Clause.” We have also stated:

Procedural due process includes notice to the person whose right is affected by the proceeding; reasonable opportunity to refute or defend against the charge or accusation; reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation; representation by counsel, when such representation is required by the Constitution or statutes; and a hearing before an impartial decisionmaker.

In re Interest of Kelley D. & Heather D., 256 Neb. 465, 476-77, 590 N.W.2d 392, 401 (1999).

The initial termination petition, filed on February 27, 2001, alleged that the children were juveniles as defined in § 43-247(3)(a), which gives the juvenile court jurisdiction over, inter alia, any juvenile “who lacks proper parental care by reason of the fault or habits of his or her parent, guardian, or custodian.” The petition was amended on May 31 to state that the children had been in out-of-home placement since February 3, 1999, that the parents failed to maintain adequate housing for themselves and the children from February 1999 to October 2000, that the parents failed to demonstrate consistent parenting skills, that the parents failed to follow through with recommendations of mental health providers, and that the parents failed to maintain a stable relationship.

The bill of exceptions from the adjudication hearing on March 24, 1999, shows that Holly was present with counsel and that Shawn appeared pro se. The State informed the juvenile court that an amended petition had been filed and asked the court if it wanted to “re-arraign” the parents on the amended petition. The court stated: “It wouldn’t hurt to go ahead and do that since we will have to set this matter down for trial.” The court then asked Holly’s counsel if he wished to have the amended petition formally read, and the court asked Shawn if he had heard the additional sentence which was included in the

amended petition. Shawn responded: "I've looked it over, your Honor, but I'm not exactly sure. I'd have to look at the papers again." The court noted that one sentence had been added and then stated: "Everything else in the juvenile petition that was previously read to you is the same. That's the only — only additional piece." Shawn stated: "So, with this we would still be charged with — [.]". The court stated: "Everything is exactly the same. The State is just alleging specific issues, so that you are aware of." At that point, Holly's counsel stated that she understood the allegations, and she admitted the allegations.

The juvenile court informed Holly that it had jurisdiction and could require her to take necessary steps to meet the needs of the children, and she indicated that she understood. The court told her that if it accepted her admission and if the children were outside the parental home for more than 15 months of the next 22 months, the State could file a petition for the termination of her parental rights, and she indicated her understanding. Holly stated that no threats or promises had been made to her and that she was not under the influence of chemicals or drugs that would affect her thinking. The State offered a factual basis, stating that on November 18, 1998, police were dispatched to the parents' home, which was found to be in an unsafe and unsanitary condition that was dangerous to the welfare of the children. The children were taken into protective custody, and a juvenile petition was filed. Holly agreed that the statements were accurate as applied to her.

The juvenile court found that Holly had admitted the allegations, there was a factual basis for her admission, and the admission was voluntary, knowing, and intelligent. The court accepted the admission and found, as to Holly, that the children should be adjudicated as juveniles under § 43-247(3)(a).

Shawn was present during the above-described discussions. The juvenile court stated that Shawn had "exercised [his] rights" and that on April 14, 1999, the State would present evidence and Shawn could ask questions of the witnesses and present evidence of his own. Shawn requested a copy of the current charges, and the court asked if he had a copy of the amended petition. Shawn said he had a copy, and then asked: "Does that take care of the last one — of the allegations of child abuse?"

That's what I didn't understand." The court explained that the single sentence that was read to Shawn from the amended petition was the only change. The court stated: "The last petition you received, you read and you understood. The amended petition, the only additional change to that is that sentence that I read to you, and you have a copy of this petition, which reflects that additional sentence." Shawn indicated that he understood.

At the April 14, 1999, hearing on the allegations as to Shawn, the juvenile court noted that Shawn had waived his right to an attorney and was representing himself. The court informed Shawn that it was the State's burden to present evidence and that he had the right to cross-examine witnesses and to present evidence.

As to Shawn, the juvenile court found that the State had met its burden of proof by a preponderance of the evidence that the juveniles were as described within § 43-247(3)(a) and again ordered custody to remain with DHHS.

We do not have a verbatim transcript of the hearing held on December 16, 1998, which was prior to the adjudication. However, the record presented to this court indicates that Shawn waived his rights and that Shawn and Holly were both represented by counsel at that hearing. The court order indicates that the court inquired as to their understanding of the contents of the petition, their rights, and the possible consequences if the allegations were admitted. This order was received as an exhibit without objection during a hearing on Shawn's motion to dismiss. Later in the hearing, the parties' objection to the exhibit was overruled.

[4] It is the responsibility of the party appealing to provide a record which supports the claimed errors. See *In re Estate of Krumwiede*, 264 Neb. 378, 647 N.W.2d 625 (2002). The parents have failed to provide a record which supports their assertion that they were not properly advised prior to the adjudication of their rights and the possible consequences of termination of their parental rights.

[5,6] The record does not indicate that any appeal was taken from the adjudication under § 43-247(3)(a). A proceeding before a juvenile court is a "special proceeding" for appellate purposes. *In re Interest of Anthony R. et al.*, 264 Neb. 699, 651

N.W.2d 231 (2002). A judicial determination made following an adjudication in a special proceeding which affects the substantial right of parents to raise their children is a final, appealable order. *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997).

[7] More specifically, it has been held that a dispositional order imposing a rehabilitation plan for parents in a juvenile case is a final, appealable order. *In re Interest of Tabatha R.*, 255 Neb. 818, 587 N.W.2d 109 (1998). See, also, *In re Interest of Clifford M. et al.*, 6 Neb. App. 754, 577 N.W.2d 547 (1998). In *In re Interest of Joshua M. et al.*, the rehabilitation plan challenged by the mother had been adopted by the juvenile court directly following the court's adjudication of the children as within § 43-247(3)(a). The mother agreed to the plan and did not appeal from the dispositional order. On appeal, we did not permit her to collaterally attack the plan adopted in the dispositional order. "Collateral attacks on previous proceedings are impermissible unless the attack is grounded upon the court's lack of jurisdiction over the parties or subject matter." *In re Interest of Joshua M. et al.*, 251 Neb. at 629, 558 N.W.2d at 559, citing *In re Interest of J.H.*, 242 Neb. 906, 497 N.W.2d 346 (1993).

[8] The record shows that there were a number of dispositional hearings held and case plans entered during the 2 years following the adjudications of March 24 and April 14, 1999. We conclude that the parents are not permitted to collaterally attack the adjudication or the case plans that were adopted pursuant to the adjudication. In the absence of a direct appeal from an adjudication order, a parent may not question the existence of facts upon which the juvenile court asserted jurisdiction. *In re Interest of Phyllisa B.*, ante p. 53, 654 N.W.2d 738 (2002); *In re Interest of Brook P. et al.*, 10 Neb. App. 577, 634 N.W.2d 290 (2001). We find that the parents have not demonstrated they were denied due process with regard to the adjudication.

At the termination hearing on May 2, 2001, Shawn and Holly each waived the reading of the petition. The juvenile court informed the parents of the following rights: (1) the right to be represented by an attorney; (2) the right to remain silent, and if that right was waived, anything the parties said could be

used against them; (3) the right to admit or deny the allegations, and if denied, the State must prove the allegations by clear and convincing evidence; (4) the right to confront and cross-examine witnesses; (5) the right to call witnesses on their own behalf; (6) the right to a speedy adjudication; and (7) the right to appeal any final decision.

Attached to the petition to terminate parental rights is a summons which is addressed to Shawn, Holly, Ty, and Devon, and a notice entitled "Some Important Rights." The rights identified include the right to an attorney or court-appointed counsel; the right to remain silent; the right to admit or deny the allegations, and if the allegations are denied, that the State must prove them as provided by law; the right to confront and cross-examine witnesses; the right to summon witnesses; the right to a speedy adjudication; and the right to appeal any final decision.

At a hearing on September 9, 2001, the State noted that the parents had not entered a denial of the allegations, and the amended petition was then read. The juvenile court asked the parents if they understood. Shawn objected, asserting that the arraignment should have taken place at the adjudication. Shawn then stated that he understood the rights as read to him. Shawn's counsel argued that his motion to dismiss was based on the failure to arraign at the adjudication and that the State's action was too late. Counsel asked that Shawn's response be stricken as not made on advice of counsel. The court noted the objections and found that the parents were present when the amended petition was read, that they understood the English language, and that both had preserved their objections.

The juvenile court also found that the parents had been informed of their right to counsel and that each was represented by counsel, their right to remain silent, their right to confront and cross-examine witnesses, their right to testify and compel witnesses to attend and testify, their right to a speedy adjudication, and the right to appeal. Each responded that they understood the rights. The court then entered a denial of the allegations by both parents and explained that the standard of proof is clear and convincing evidence. We find that the assignments of error regarding an alleged denial of due process are without merit.

BEST INTERESTS OF CHILDREN

Holly argues that the juvenile court erred in finding that it is in the best interests of the children to terminate her parental rights. She asserts that none of the witnesses could identify anything other than minor negative events which occurred while the children were in the parents' care and that the children have sustained significant harm while in the care of the foster parents.

[9,10] In order to terminate parental rights, the State must prove by clear and convincing evidence that one of the statutory grounds enumerated in § 43-292 exists *and* that termination is in the children's best interests. *In re Interest of Clifford M. et al.*, 261 Neb. 862, 626 N.W.2d 549 (2001). The purpose of § 43-292(6) is to advance the best interests of the children by giving the juvenile court power to terminate parental rights where the grounds for adjudicating the children within § 43-247(3)(a) have not been corrected. *In re Interest of Rachael M. & Sherry M.*, 258 Neb. 250, 603 N.W.2d 10 (1999).

The State alleged as one ground for termination of parental rights that following a determination that the juveniles are ones as described in § 43-247(3)(a), reasonable efforts to preserve and reunify the family have failed to correct the conditions leading to the § 43-247(3)(a) determination. See § 43-292(6).

The parents argue that because it was stipulated that the condition of their home was not an issue after October 2000, the State has not proved by clear and convincing evidence that reasonable efforts failed to correct the unsafe and unsanitary home which was the basis for the initial adjudication. Holly contends that even if the State can assert the failure to follow the specific details of the case plan as a basis to terminate parental rights, the details of the case plan must be material to addressing the § 43-247(3)(a) adjudication.

[11,12] Where the failure of a parent to comply with a rehabilitation plan is an independent ground for termination of parental rights, the rehabilitation plan must be conducted under the direction of the juvenile court and must be reasonably related to the objective of reuniting parent with child. *In re Interest of Joshua M.*, 251 Neb. 614, 558 N.W.2d 548 (1997); *In re Interest of C.D.C.*, 235 Neb. 496, 455 N.W.2d 801 (1990). Once a plan of reunification has been ordered to correct the

conditions underlying the adjudication under § 43-247(3)(a), the plan must be reasonably related to the objective of reuniting the parents with the children. See *In re Interest of C.D.C.*, *supra*.

We have found that there was a proper adjudication and that the juvenile court acquired jurisdiction of the parties. The parents cannot now collaterally attack the proceedings or the contents of the case plans that were implemented for the purpose of reuniting the parents with the children.

The children were initially removed from the home based upon the uncleanliness of the home. The home was filthy, and the conditions were inappropriate for children. Bottles contained spoiled formula or milk. Feces stains were seen on the carpet. The children's room had a strong odor of urine and spoiled formula or milk. The breathing treatment apparatus used by Devon was filthy and unusable, and no medication for the machine was found in the home.

The case plans that were implemented were not adopted merely to teach the parents how to clean a house. If cleanliness was the sole issue to be addressed prior to reuniting the family, it would not have been necessary for DHHS to expend more than \$111,000 in resources trying to reunite the parents with the children. The conditions observed in the house were only a symptom of the problems which led to the adjudication and the subsequent plans for reunification. They did not represent a situation which could be remedied by simply hiring a cleaning service.

In its termination order, the juvenile court stated:

The rehabilitation plan(s) fashioned, determined and ordered by the court . . . were designed to correct the conditions of the home previously adjudicated by the court. These unsafe and unsanitary home conditions reflect problems in parenting skills, domestic violence and recognizing the needs of their children. Examining the reasonable steps for rehabilitation directed by [the] Court ordered plans, the parents consistently fail[ed] to comply by not attending individual counseling, addressing spousal violence or demonstrating proper parenting skills during visitations. . . . The evidence shows that DHHS provided multiple resources and services for both the mother and the father but neither parent shows an ability or consistent commitment and willingness

to succeed. Partial compliance with these plans is not enough. See [*In re Interest of L.H. et al.*,] 241 Neb. 232[, 487 N.W.2d 279 (1992)]. The parents have been unable to make satisfactory progress for reunification.

DHHS began working with Shawn and Holly immediately after the children were adjudicated. The children were first removed from the home and placed with Shawn's parents until December 7, 1998. The children returned to the parental home from December 7, 1998, to February 3, 1999. Between February 3 and October 1, 1999, they again lived with the grandparents. From October 1, 1999, to October 31, 2001, the children resided with foster parents. A number of issues other than cleanliness were identified as areas which Shawn and Holly needed to address.

The juvenile court agreed to a modified case plan received on April 21, 1999, which included goals for each parent. Holly was directed to attend domestic violence sessions and to learn appropriate money management. Shawn was directed to complete anger management classes. Both were directed to undergo psychological evaluation and comply with all recommendations, to refrain from the use of any form of physical discipline, to maintain adequate housing, to obtain and maintain employment, to attend marriage counseling, and to attend and complete parenting classes. The plan specified that there was to be no violence in the parents' home.

A "Court Report/Case Plan" was filed on August 3, 1999. The report indicates that the parents had demonstrated an ability to bring the home to a "minimal standard level" of cleanliness, but they were unable to maintain it. Holly had moved back in with Shawn after living at a crisis center for a period of time. She had not attended counseling sessions since she moved back in with Shawn, and she did not attend a followup visit with a psychologist. The parents continued to demonstrate inconsistency in interactions with and discipline of the children and needed to be prompted to change diapers, to clean the table after eating, and to exhibit other basic parenting skills. Neither parent demonstrated interest in learning financial management, reporting that they had insufficient money to purchase Holly's medication for depression, but they were able to support their smoking habits.

Shawn reported spending \$800 to repair a car. The DHHS workers recommended that the parents continue marriage counseling and individual counseling, obtain skills needed to protect the children, maintain a clean and safe environment for the children, and attend family therapy. It was recommended that Shawn continue anger management classes and that Holly continue domestic violence sessions.

Additional case plans were filed and received by the juvenile court on April 20 and October 20, 1999, April 21 and August 31, 2000, and January 12, 2001. At a hearing on November 30, 2001, Mary Goodwin, a protection and safety worker for DHHS who had been the caseworker for the parents since April 2000, testified as to the goals outlined in the final case plan for reunification of the family.

The first goal was for Holly to acquire skills to provide a clean and safe environment for the children. While Shawn was incarcerated between October 1999 and October 2000, Holly lived in various places, but did not have a residence of her own. In September 2000, Holly had obtained her own residence, but she said she was not ready to have the children returned to her. Holly had requested that the children be removed from the home in February 1999 because she was afraid of Shawn, who had broken a car window and "thrown the other son, Nicki, around."

A second goal was for Holly to address her mental health issues and comply with all mental health recommendations. Holly dropped out of therapy between August and November 2000 and again in May 2001.

The third goal called for Holly to acquire the skills needed to protect her children from domestic violence by participating in a domestic violence support group and to demonstrate an ability to assert herself in a way that would protect her and the children. Holly attended three sessions on domestic violence in November and December 2000. She received a psychiatric evaluation on July 31, 2000, and was given medication for depression. Psychological evaluations were later scheduled, but neither Holly nor Shawn appeared, and they did not reschedule the appointments.

The fourth goal was for Holly to demonstrate the ability to manage her children's behavior at all times during visits.

Goodwin said the children's behavior was chaotic during visits, and Holly admitted that she could not control the children, who would be aggressive toward each other and would not listen to Holly. At times, she would "zone out" and would not notice that the children were "tearing up" the visitation room. On one occasion, they pulled down the drapes. They jumped off tables and climbed up on a file cabinet and jumped off. On another occasion, one boy jumped onto a pile of blankets, injuring another boy who was underneath the blankets. Goodwin stated that these problems were ongoing.

The fifth goal was for Holly to address her marital situation and determine whether it is in the best interests of her children to continue her relationship with Shawn. In September 2000, Holly reported that Shawn had threatened to break her hips, and in October 2000, she reported that she was hiding from Shawn because he was getting out of jail and she was afraid of him. However, the couple reunited when Shawn was released from jail.

The sixth goal was for Holly to learn to manage her finances to demonstrate that she can provide for the basic needs of her children and herself. Holly obtained her own home in September 2000.

The seventh goal was for Shawn to acquire the skills needed to provide a clean environment for his children. Goodwin said he was not able to work on the goal because he was incarcerated for a year.

The eighth goal was for Shawn to address mental health issues and to comply with mental health recommendations. Shawn completed a psychological evaluation in July 1999, which resulted in a finding that Shawn had an issue with anger management. It was recommended that Shawn receive counseling for anger management, parenting issues, and marital issues. After the parents missed appointments for counseling, they were referred to Susan Rippke, an in-home therapist. Shawn had several sessions with Rippke before Shawn was incarcerated. Holly missed approximately five appointments between August and November 1999. She was then scheduled to travel to Omaha for counseling, but dropped out after one appointment. Shawn received some therapy while in jail and was in therapy at the time of the November 2001 hearing.

The ninth goal was for Shawn to gain control over his temper and learn to manage his anger in appropriate ways. When he was released from jail in October 2000, he was referred to a men's group to address domestic violence, but he did not take part.

The 10th goal was for Shawn to increase his parenting knowledge and skills, demonstrate an understanding of child development, learn and utilize nonphysical ways to discipline, and respond to his children in a nurturing manner. Goodwin said the parents had taken advantage of parenting assistance on only a few occasions. Problems with managing the children's behavior during visits continued, and Goodwin reported occasions when Shawn yelled at Ty. Shawn countermanded consequences given by Holly and told the children they did not have to follow her directions. The parents continued to neglect safety issues by allowing the children to ride on the bottom of carts at stores, which resulted in injury to one of the children. The parents allowed Ty to ride a toy motorcycle into the street when a car was approaching.

Goodwin said two family support workers had been present at visitations since June 2001 because Holly had become agitated and upset and threatened to kill Goodwin. Goodwin said the visits had been less chaotic since the second family support worker was introduced. However, the parents continued to have arguments and disagreements during visitations.

The 11th goal was for Shawn to learn to manage his finances to demonstrate an ability to provide for his and the children's needs. Shawn worked at one job from December 2000 to June 2001. At the end of June, he began working at another job, where he reported earning about \$1,500 every 2 weeks and working "a lot" of overtime. Holly worked part-time jobs between February 1999 and June 2000, when she began working a full-time job, where she worked until September. She was unemployed between September and November 2000. She worked at another job from November 2000 until September 2001, was unemployed for a while, and then began working again.

Goodwin's testimony indicates that the parents have continued to behave in ways which are not in the best interests of the children. They have received various forms of assistance from

DHHS staff, yet they have not been able to meet the goals set for them over a 2-year period.

While it appears that the parents have addressed some of the issues in the case plans, we have held that

“‘participation in certain elements of the court-ordered plan does not necessarily prevent the court from entering an order of termination where the parent has made no progress toward rehabilitation. A parent is required not only to follow the plan of the court to rehabilitate herself but also to make reasonable efforts on her own to bring about rehabilitation.’”

In re Interest of L.H. et al., 241 Neb. 232, 246, 487 N.W.2d 279, 289 (1992), quoting *In re Interest of M.*, 235 Neb. 61, 453 N.W.2d 589 (1990). This court has also held that partial compliance with one provision of a rehabilitation plan does not prevent termination of parental rights.

[13] In addition, this court has held that the juvenile court is not limited to reviewing the efforts of the parent under the plan last ordered by the court; rather, the court looks at the entire reunification program and the parent’s compliance with the various plans involved in the program, as well as any effort not contained within the program which would bring the parent closer to reunification.

In re Interest of L.J., M.J., and K.J., 238 Neb. 712, 719, 472 N.W.2d 205, 211 (1991). A court is not prohibited from considering prior events when determining whether to terminate parental rights, but the court may need to consider the reasonableness of a plan or its individual provisions. See *In re Interest of P.D.*, 231 Neb. 608, 437 N.W.2d 156 (1989). “It is impossible to determine whether a plan to reunite a parent and child is reasonable without considering whether the plan is designed to correct problems which required the State’s intervention in the first place. Review of prior events is essential to this determination.” *Id.* at 617, 437 N.W.2d at 163.

In our de novo review, we conclude that the record shows by clear and convincing evidence that it is in the best interests of the children to terminate the parental rights of Shawn and Holly. The parents have been provided many reasonable opportunities to rehabilitate, and they have failed to do so. The condition of

the home was merely a manifestation of the parents' inability to properly care for their children. The evidence clearly and convincingly shows that the parents willfully failed to comply in whole or in part with the material provisions of the rehabilitation plans.

HOLLY'S MOTION TO STRIKE

Holly complains about the juvenile court's overruling of her motion to strike certain allegations of the amended petition. She argues that these allegations were not relevant, were vague and indefinite, and were not related to any material provision of the case plan.

In her brief, Holly argues only that the motion to strike attempted to address issues of due process. Holly has provided no authority for her allegation that the juvenile court erred in failing to grant her motion to strike. For the same reasons noted above related to due process rights, we do not find any merit to this assignment of error.

PARENTS' MOTIONS FOR PSYCHOLOGICAL AND PSYCHIATRIC EVALUATIONS

Both parents assert that the juvenile court erred in failing to order psychological and psychiatric evaluations of the children. Shawn suggests that the State objected to evaluation of the children because it might impinge on adoption proceedings which were already underway. Shawn apparently wanted the evaluations to demonstrate that the children were having emotional difficulties in the foster home. However, he provides no authority for his argument.

Holly suggests that the evaluations would have been appropriate pursuant to Neb. Rev. Stat. § 43-258 (Reissue 1998), which provides for *preadjudication* mental and physical examinations to aid the court in determining the juvenile's physical or mental condition, the juvenile's competence, the juvenile's responsibility for his or her acts, or the need for emergency medical treatment. At the time the parties requested the evaluations, the children had already been adjudicated as juveniles under § 43-247(3)(a). Section 43-258 is not relevant in this case.

The only reason to conduct psychological or psychiatric examinations would have been to determine whether the children

needed some form of psychological help. Such testing would not have been useful in determining whether the children should be returned to Shawn and Holly. The parents sought the evaluations to show that the children also had emotional problems while in foster care. Even if such a showing had been made, it would not necessarily require that the children be returned to the parental home. We find no authority requiring such evaluations and find no error on the part of the juvenile court for overruling the motions.

ADMISSION OF CERTIFIED COURT DOCUMENTS

Shawn assigns as error, as a part of his due process argument, that the juvenile court erred in receiving into evidence certified court documents from the underlying juvenile action without foundation and without a transcript of the proceedings. Holly also raises the issue as error and asserts that exhibits 3 through 44 were not based on adjudicated facts and that, as such, the court should not have taken judicial notice of the exhibits. She argues that many of the exhibits are dispositional orders, which are entered following dispositional hearings, at which the rules of evidence do not apply. In addition, she argues that the hearings are conducted based on a preponderance of the evidence standard, which is a lower standard of proof than that used in termination hearings.

[14] As noted earlier, neither Holly nor Shawn appealed from the dispositional orders which found their children to be juveniles under § 43-247(3)(a). This court has held that a detention order issued under § 43-247(3)(a) and Neb. Rev. Stat. § 43-254 (Reissue 1998) after a hearing which continues to withhold the custody of a juvenile from the parent pending an adjudication hearing to determine whether the juvenile is neglected is a final order and thus appealable. *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997). Shawn and Holly waived this error by failing to appeal from the previous orders.

Holly's argument is also based on an assertion that the juvenile court could not take judicial notice of its earlier orders. We have held that the "concept of judicial notice of *disputed* allegations has no place in hearings to terminate parental rights." (Emphasis supplied.) *In re Interest of L.H. et al.*, 241 Neb. 232, 243, 487 N.W.2d 279, 287 (1992). However, Holly did not dispute the

allegations in the underlying action. In fact, at the hearing on March 24, 1999, she admitted the allegations.

[15-17] In addition, we have held that reports may not be received in evidence for the purpose of a termination proceeding, nor relied upon by the court, unless they have been admitted without objection or brought within the provisions of Neb. Evid. R. 803(23), Neb. Rev. Stat. § 27-803(23) (Cum. Supp. 2002), an exception to the hearsay rule. See *In re Interest of J.K.B. and C.R.B.*, 226 Neb. 701, 414 N.W.2d 266 (1987). While the parties objected to the admission of exhibits related to the underlying disposition, they did not object on the basis of judicial notice. The juvenile court was not asked to take judicial notice of the previous orders, but was asked to admit them into evidence. An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court. *Claypool v. Hibberd*, 261 Neb. 818, 626 N.W.2d 539 (2001). Absent a showing to the contrary, it is presumed that the trial court disregarded all incompetent and irrelevant evidence. *In re Interest of L.H. et al.*, *supra*.

[18-22] Even if the exhibits were not properly received, the improper admission of evidence by the juvenile court in a parental rights termination proceeding does not, in and of itself, constitute reversible error; a showing of prejudice must be made. *Id.* The parties must show that the inclusion of the exhibits in the evidence was prejudicial to their due process rights. *Id.* Factual questions concerning a judgment or order terminating parental rights are tried by an appellate court de novo on the record, and impermissible or improper evidence is not considered by the appellate court. *Id.* In an appeal from a judgment or order terminating parental rights, the appellate court, in a trial de novo on the record and disregarding impermissible or improper evidence, determines whether there is clear and convincing evidence to justify termination of parental rights under the Nebraska Juvenile Code. *In re Interest of L.H. et al.*, *supra*.

“[A]s a subject for judicial notice, existence of court records and certain judicial action reflected in a court’s record are, in accordance with Neb. Evid. R. 201(2)(b), facts which are capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned.”

... [I]n *State v. Norwood*, 203 Neb. 201, 204-05, 277 N.W.2d 709, 711 (1979)[, the court stated]: “[A juvenile court] has a right to examine its own records and take judicial notice of its own proceedings and judgment in an interwoven and dependent controversy where the same matters have already been considered and determined.”

In re Interest of C.K., L.K., and G.K., 240 Neb. 700, 708-09, 484 N.W.2d 68, 73 (1992).

In the case at bar, the juvenile court admitted into evidence its own records and case plans in an interwoven and dependent controversy. The assignment of error concerning the admission of court orders has no merit.

REASONABLE EFFORTS

Shawn argues that the juvenile court erred in finding that reasonable efforts had been made to preserve and reunify the family in the juvenile action and in the termination proceedings. He asserts that the State did not meet its burden because it relied on certified copies of prior court orders and did not elicit testimony on the reasonable efforts which had been made. Shawn appealed from the juvenile court’s overruling of his motion to show reasonable efforts, but the appeal was dismissed for lack of a final order. See *In re Interest of Nicholas H. et al.*, 10 Neb. App. xlvii (No. A-01-756, Aug. 30, 2001).

Holly argues that the State did not meet its burden to show that reasonable efforts would not result in reunification of the family. She suggests that the parents’ opportunity to work toward reunification was thwarted by the actions of DHHS to decrease visitation.

We have held that the State must prove by clear and convincing evidence that one of the statutory grounds enumerated in § 43-292 exists and that termination is in the child’s best interests. “Thus, only one ground for termination need be proved in order [to terminate] parental rights . . .” *In re Interest of Michael B. et al.*, 258 Neb. 545, 557, 604 N.W.2d 405, 413 (2000).

Section 43-292 identifies the grounds for termination of parental rights. It provides that termination may be ordered when it is in the best interests of the children and another condition exists. Subsection (6) allows for termination after a determination

that the juveniles fall under § 43-247(3)(a) and reasonable efforts to preserve and reunify the family if required under Neb. Rev. Stat. § 43-283.01 (Reissue 1998), under the direction of the court, have failed to correct the conditions leading to the determination. Subsection (7) allows for termination after the juveniles have been in an out-of-home placement for 15 or more months of the most recent 22 months.

The parties stipulated to the dates of the children's out-of-home placement, which clearly showed that they had been out of the parental home for all but 2 of the approximately 36 months before the termination hearing. They were in foster care with nonrelatives for more than 24 months immediately preceding the hearing. Thus, § 43-292(7) applies to these children, and if it is in their best interests to be removed from the home on this basis, the juvenile court may so order.

[23] The record shows that DHHS worked with the family for almost 3 years before parental rights were terminated. The case plans in evidence and the court hearings and orders in the record support a finding that reasonable efforts were made to reunify the family. As we have held on numerous occasions, children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity. See *In re Interest of DeWayne G. & Devon G.*, 263 Neb. 43, 638 N.W.2d 510 (2002). The assignment of error concerning reasonable efforts has no merit.

UNCONSTITUTIONALITY OF § 43-292(7)

The parents assert that § 43-292(7) is unconstitutional because it uses an arbitrary and vague standard to terminate parental rights based solely on the length of time a child has been placed outside the home. The parents' arguments concerning the constitutionality of § 43-292(7) are stated in broad terms and suggest only that the statute violates due process because it provides an arbitrary standard.

We have frequently held that where a parent is unable or unwilling to rehabilitate himself or herself within a reasonable time, the best interests of the children require termination of the parental rights. See *In re Interest of DeWayne G. & Devon G.*, *supra*. As the State notes, subsection (7) merely provides a

guideline for the “reasonable time” given to the parents to rehabilitate themselves.

The language of § 43-292 imposes two requirements before parental rights may be terminated. First, requisite evidence must establish the existence of one or more of the circumstances described in subsections (1) to (10) of § 43-292. Second, if a circumstance designated in subsections (1) to (10) is evidentially established, there must be the additional showing that termination of parental rights is in the best interests of the child, the primary consideration in any question concerning termination of parental rights. . . . Each of the requirements prescribed by § 43-292 must be proved by clear and convincing evidence.

In re Interest of Sunshine A. et al., 258 Neb. 148, 153, 602 N.W.2d 452, 457 (1999).

Section 43-292(7) is not unconstitutional. Adequate safeguards are provided to ensure that parental rights are not terminated based solely upon the length of time children are in an out-of-home placement.

CONCLUSION

The children in this case were initially removed from the home because it was filthy and unlivable. Although these conditions were apparently corrected at a later date, they were not the only basis upon which parental rights were terminated. The uncleanness of the home was a manifestation of a lack of parenting skills on the part of Shawn and Holly. During a period of more than 2 years, the parents were unable to correct these deficiencies.

We find no error on the part of the juvenile court in its judgment terminating the parental rights of Shawn and Holly to Ty and Devon. The judgment is affirmed.

AFFIRMED.

TAUNIA FUHRMAN, APPELLEE, V.
STATE OF NEBRASKA ET AL., APPELLANTS.
655 N.W.2d 866

Filed January 24, 2003. No. S-01-767.

1. **Pleadings.** A decision to grant or deny an amendment to a pleading rests in the discretion of the trial court.
2. **Tort Claims Act: Appeal and Error.** In actions brought pursuant to the State Tort Claims Act, the factual findings of the trial court will not be disturbed on appeal unless they are clearly wrong, and when determining the sufficiency of the evidence to sustain the verdict, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in favor of such party, and it is entitled to the benefit of every inference that can reasonably be deduced from the evidence.
3. **Tort Claims Act: Proof.** In order to recover in a negligence action brought pursuant to the State Tort Claims Act, a plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and damages.
4. **Negligence.** The threshold issue in any negligence action is whether the defendant owes a legal duty to the plaintiff.
5. _____. Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation. In determining whether a legal duty exists, this court employs a risk-utility test, considering (1) the magnitude of the risk, (2) the relationship of the parties, (3) the nature of the attendant risk, (4) the opportunity and ability to exercise care, (5) the foreseeability of the harm, and (6) the policy interest in the proposed solution.
6. _____. Foreseeability in the context of a legal duty is a question of law.
7. **Negligence: Evidence.** While violation of a regulation is not negligence per se, it is evidence of negligence.
8. **Negligence: Words and Phrases.** An efficient intervening cause is a new, independent force intervening between the defendant's negligent act and the plaintiff's injury by the negligence of a third person who had full control of the situation, whose negligence the defendant could not anticipate or contemplate, and whose negligence resulted directly in the plaintiff's injury.
9. **Negligence.** An efficient intervening cause must break the causal connection between the original wrong and the injury.
10. **Negligence: Tort-feasors: Liability.** The doctrine that an intervening act cuts off a tort-feasor's liability comes into play only when the intervening cause is not foreseeable.
11. **Negligence: Proximate Cause.** Foreseeability that affects proximate cause relates to the question of whether the specific act or omission of the defendant was such that the ultimate injury to the plaintiff reasonably flowed from the defendant's alleged breach of duty.
12. **Negligence.** An action that was foreseeably within the scope of the risk occasioned by the defendant's negligence cannot be said to supersede that negligence.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Affirmed.

Don Stenberg, Attorney General, Royce N. Harper, and Michelle M. Lewon, Senior Certified Law Student, for appellants.

Michael F. Coyle and Timothy J. Thalken, of Fraser, Stryker, Meusey, Olson, Boyer & Bloch, P.C., for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

I. NATURE OF CASE

Taunia Fuhrman filed a petition under the State Tort Claims Act alleging the State of Nebraska; the Department of Health and Human Services, formerly known as the Department of Social Services (DHHS); and Pam Curry, a DHHS employee (collectively appellants), were liable to Fuhrman for damages she sustained on December 12, 1995, when a ward of the State assaulted Fuhrman at Immanuel Medical Center (Immanuel) in Omaha, Nebraska. Following a bench trial, the Douglas County District Court entered judgment in Fuhrman's favor in the amount of \$171,829.59. Appellants filed this appeal. We affirm.

II. STATEMENT OF FACTS

Since November 23, 1988, DHHS has been the legal guardian of Jeffrey L., a minor born on December 4, 1981. After becoming a ward of the State, Jeffrey was placed in either foster care or a care facility. Prior to December 12, 1995, his placement had changed at least 36 times. The turnover was due in part to Jeffrey's physical violence against his caregivers and others. The record reflects that Jeffrey was large and strong for his age. On December 12, Jeffrey weighed approximately 200 pounds.

The history of Jeffrey's conduct was known to DHHS and documented in its records. Those records detailed 27 separate incidents in which Jeffrey assaulted a staff member or someone else at the location of his placement and which had occurred prior to October 1995, when he was transferred to Immanuel. These incidents included: (1) hitting a staff member who sustained injuries

necessitating crutches; (2) attacking a staff member with a croquet mallet; (3) biting a staff member so that the staff member required a tetanus shot; (4) assaulting two staff members, as a result of which one required crutches and the other needed stitches; and (5) choking, punching, and pulling the hair of a staff member. As a result of these and other incidents, Jeffrey had been arrested and convicted of criminal assault on three separate occasions. Many of the attacks involved female staff members, and in this connection, DHHS' records indicated that Jeffrey was "more likely to become angry and aggressive with female authority figures" and that he might target females "in particular."

In October 1995, Jeffrey's DHHS caseworker was Susan Hensler. Hensler was aware of Jeffrey's history of physical violence and his assaultive behavior. Hensler had taken over responsibility for Jeffrey's file in June 1995, at which time, she had been advised by another DHHS caseworker that she should use caution in dealing with Jeffrey because he was violent and that Hensler ought not to be alone with him.

On October 19, 1995, Hensler received a telephone call from the director of the Boys and Girls Home and Family Services in South Sioux City, Nebraska (Boys and Girls Home), where Jeffrey was a resident, seeking the removal of Jeffrey from the facility. In the week prior to his discharge from the Boys and Girls Home, Jeffrey had had 13 aggressive episodes. According to the discharge papers, "[o]n three different occasions, [Jeffrey] bit staff members during physical confrontations. These bites broke the skin and required the staff members to seek medical attention. [Jeffrey] also engaged in self harming behaviors during his explosive episodes . . . [Jeffrey] repeatedly threatened to kill himself and/or to kill others." The director of the Boys and Girls Home advised Hensler that he wanted Jeffrey transferred immediately. Although Hensler was not given the details regarding Jeffrey's recent behavior, Hensler testified that the director threatened that Jeffrey would simply be "dropped on the street[s] of Omaha" if alternate placement arrangements were not made.

As a result of the director's telephone call, Hensler arranged to place Jeffrey at Immanuel on October 19, 1995. Immanuel is an acute care center, which treats psychiatric patients who cannot be

managed on an outpatient basis and who require immediate hospitalization for safety, diagnosis, and treatment. At no time did Hensler provide Immanuel with the details concerning why Jeffrey was being transferred from the Boys and Girls Home.

After making arrangements to place Jeffrey with Immanuel, pursuant to 474 Neb. Admin. Code, ch. 4, § 009.20E (1991), Hensler drove to the hospital to meet the Boys and Girls Home representative traveling with Jeffrey and to facilitate Jeffrey's admission into the hospital. Section 009.20E provides, in pertinent part, as follows:

Placement: At the time of placement, the [case]worker shall -

1. Accompany the parent(s) and child to the foster home or placement facility, observing reactions and answering relevant questions

. . . .

4. Give the . . . caregiver a copy of the Child's Health Record, and discuss the ward's medical needs with the . . . facility staff

5. Answer the . . . caregiver(s)' questions[.]

Further, pursuant to 474 Neb. Admin. Code, ch. 4, § 009.20B (1988), when preparing for the placement of a child under DHHS' authority, the caseworker is to gather certain information and provide it to the new caregiver. Included in the information to be provided to the receiving caregiver is information regarding "[t]he child's daily habits and behaviors, particularly any known or suspected tendencies which could be dangerous or detrimental to the child himself/herself, a foster or adoptive family member, facility staff, or other, including but not limited to . . . [v]iolence"

When Jeffrey had not arrived at Immanuel by 6:30 p.m. on October 19, 1995, and notwithstanding the requirements of § 009.20, Hensler left Immanuel. Later that evening, Hensler called the hospital and was told Jeffrey had arrived and had been admitted. That same evening, Hensler had a telephone conversation with someone at Immanuel's access center with respect to Jeffrey's admission. Hensler provided the hospital with Jeffrey's name, address, and insurance information. In this regard, Hensler testified that on October 19, she talked on the telephone

to someone at the access center named "Peg." Hensler testified that during this conversation, she informed Peg that Jeffrey was physically aggressive. Hensler admitted that she did not know where Peg was physically located. "Peg" was not identified by any witness at trial.

It is undisputed that Hensler did not tell anyone at Immanuel that Jeffrey had assaulted at least 27 people, that he had three separate convictions for assault, or that he was likely to target female staff members. It is also undisputed that Hensler did not knowingly talk with any members of the psychiatric staff at Immanuel who were responsible for caring for or treating Jeffrey regarding Jeffrey's propensity for violence and his previous assaults. Furthermore, it is undisputed that despite the wealth of records DHHS possessed regarding Jeffrey's history of violence and Hensler's knowledge of Jeffrey's assaultive behavior, neither Hensler nor any other DHHS representative gave Immanuel the documentation concerning Jeffrey's numerous placements and violent behavior.

Following his admission to Immanuel, it is undisputed that Jeffrey acted out on several occasions. On December 12, 1995, while a patient at Immanuel, Jeffrey became angry and left his group therapy session. Fuhrman, a psychiatric technician with Immanuel, followed Jeffrey and convinced him to go to a "quiet room." On the way to the quiet room, Jeffrey ran down the hall, tore the holiday decorations off the wall, and turned to Fuhrman and said he was going to kill her. He then proceeded to choke her, knee her, and pull large portions of her hair from her scalp, while stating, "I'm going to kill her" and "She's not dead yet." It took 12 adults to pull Jeffrey off of Fuhrman. At the time of the attack, Fuhrman was 24 years of age, stood 5 feet 1 inch tall, and weighed 105 pounds. At the time of the attack, the record reflects that Jeffrey was 14 years old and weighed approximately 200 pounds.

Fuhrman was seriously injured as a result of Jeffrey's attack and incurred medical expenses in excess of \$16,800. She was not able to return to her former position as a psychiatric technician and has held a variety of jobs since the incident. At trial, Fuhrman testified that she was never informed regarding Jeffrey's previous assaults on caregivers, was never told that

Jeffrey would direct aggression at female caregivers, and did not know about his previous convictions for assault.

Fuhrman filed a claim pursuant to the State Tort Claims Act. See Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 1996 & Cum. Supp. 2002). The State denied Fuhrman's claim, and thereafter, Fuhrman filed a lawsuit against appellants. In her amended and controlling petition, Fuhrman claimed that appellants were negligent in failing to disclose to Immanuel and its employees information regarding Jeffrey's "aggressive and uncontrollable assaultive behavior."

Fuhrman's case was tried to the district court on July 12 through 14, and 31, 2000. The record contains approximately 900 pages of testimony from 10 witnesses and 44 exhibits. Near the close of trial, appellants moved for leave to amend their answer to include the affirmative defenses of sovereign and qualified immunity, based on their understanding that Fuhrman was asserting that appellants had misrepresented Jeffrey's medical history. The district court denied appellants' motion.

In an order filed May 1, 2001, the district court made numerous findings of fact to the effect that DHHS possessed considerable information regarding Jeffrey's history of violent and dangerous behavior and propensities and that DHHS had failed to disclose such information to Immanuel. The district court concluded that appellants had a duty to disclose such information but had breached their duty to disclose such information to Immanuel and its employees. The district court further concluded that this breach was the proximate cause of Fuhrman's injuries and damages. The district court entered judgment in favor of Fuhrman. Fuhrman was awarded damages in the amount of \$171,829.59. Appellants then filed this appeal.

III. ASSIGNMENTS OF ERROR

On appeal, appellants allege two assignments of error. Appellants claim, restated and renumbered, that the district court erred (1) in denying appellants' motion to amend their answer to include the affirmative defenses of sovereign and qualified immunity and (2) in determining that appellants were negligent in failing to disclose the information regarding Jeffrey's violent and dangerous propensities.

IV. STANDARDS OF REVIEW

[1] A decision to grant or deny an amendment to a pleading rests in the discretion of the trial court. *McDonald v. Myre*, 262 Neb. 171, 631 N.W.2d 125 (2001).

[2] In actions brought pursuant to the State Tort Claims Act, the factual findings of the trial court will not be disturbed on appeal unless they are clearly wrong, and when determining the sufficiency of the evidence to sustain the verdict, it must be considered in the light most favorable to the successful party. *Fu v. State*, 263 Neb. 848, 643 N.W.2d 659 (2002). Every controverted fact must be resolved in favor of such party, and it is entitled to the benefit of every inference that can reasonably be deduced from the evidence.

V. ANALYSIS

1. AMENDMENT TO ANSWER TO ADD AFFIRMATIVE DEFENSES

Appellants claim that the district court erred in denying their motion to amend their answer during the course of the trial to assert the affirmative defenses of sovereign and qualified immunity. Appellants argue that although pleaded as a failure-to-disclose-information case, Fuhrman's case against appellants at trial was fundamentally based on misrepresentation, and that the State Tort Claims Act does not provide a remedy for actions arising from misrepresentation. See § 81-8,219(4). Appellants acknowledge that sovereign and qualified immunity are affirmative defenses which should be affirmatively pleaded or are considered waived. *Lawry v. County of Sarpy*, 254 Neb. 193, 575 N.W.2d 605 (1998) (exceptions found in § 81-8,219 are matters of defense which must be pleaded and proved by State). See, also, *Jameson v. Liquid Controls Corp.*, 260 Neb. 489, 618 N.W.2d 637 (2000) (affirmative defense must be successfully pleaded to be considered). Appellants nevertheless assert that they should have been allowed to amend their answer to conform to the proof at trial.

In her amended petition, Fuhrman alleged that appellants had failed to disclose information. At trial, Fuhrman offered evidence for the purpose of establishing that appellants had totally failed to disclose the lengthy and recent history pertaining to

Jeffrey's violent propensities. Neither Fuhrman's theory of the case nor her evidence was based on misrepresentation, but, rather, on a complete failure to convey the critical information, without an inference that this was deliberately done.

A decision to grant or deny an amendment to a pleading rests in the discretion of the trial court. *McDonald, supra*. The district court did not abuse its discretion in this case. The district court's order of May 1, 2001, states that the action "arises" out of appellants' failure to inform Immanuel and its employees of Jeffrey's propensities. In the same order, the district court concluded that appellants were "negligent in failing to . . . inform Immanuel and its employees of [Jeffrey's] violent and dangerous propensities . . . when he was admitted to Immanuel." The district court's decision in favor of Fuhrman was based on failure to disclose information.

Given the pleadings, the record in this case, and the district court's order, we conclude that the district court did not abuse its discretion in denying appellants' motion for leave to amend their answer. This assignment of error is without merit.

2. NEGLIGENCE

(a) Duty to Disclose Information

Appellants contend generally that they met their duty in connection with the placement of Jeffrey at Immanuel and that in any event, because Jeffrey's aggressive behavior was apparent, the district court erred in concluding that appellants were negligent.

[3,4] In order to recover in a negligence action brought pursuant to the State Tort Claims Act, a plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and damages. *Fu v. State*, 263 Neb. 848, 643 N.W.2d 659 (2002). The threshold issue in any negligence action is whether the defendant owes a legal duty to the plaintiff. *Id.* If there is no legal duty, there is no actionable negligence. *Id.*

[5,6] Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation. *Id.* In determining whether a legal duty exists, this court employs a risk-utility test, considering (1) the magnitude of the risk, (2) the relationship of the parties, (3) the nature of the attendant risk,

(4) the opportunity and ability to exercise care, (5) the foreseeability of the harm, and (6) the policy interest in the proposed solution. *Sharkey v. Board of Regents*, 260 Neb. 166, 615 N.W.2d 889 (2000). We have stated:

“‘Foreseeability as it impacts duty determinations refers to “‘the knowledge of the risk of injury to be apprehended. The risk reasonably to be perceived defines the duty to be obeyed; it is the risk reasonably within the range of apprehension, of injury to another person, that is taken into account in determining the existence of the duty to exercise care.’” . . .’”

. . . “[T]he law does not require precision in foreseeing the exact hazard or consequence which happens; it is sufficient if what occurs is one of the kinds of consequences which might reasonably be foreseen.”

Id. at 179, 181, 615 N.W.2d at 900-01 (quoting *Knoll v. Board of Regents*, 258 Neb. 1, 601 N.W.2d 757 (1999)). Foreseeability in the context of a legal duty is a question of law. *Fu, supra*.

Based on the facts of the case, we have previously recognized that when DHHS had “ample information that [a State ward] had a history of violent and abusive behavior” and was faced with questions regarding the potential risk posed to children who were exposed to the ward, DHHS “had a duty . . . to answer truthfully as to any knowledge it had or later acquired as to [the ward’s] violent propensities and any danger that [other children] might encounter by being left alone with [the ward].” *Anderson/Couvillon v. Nebraska Dept. of Social Servs.*, 248 Neb. 651, 658, 538 N.W.2d 732, 738 (1995). See, generally, *Johnson v. State of California*, 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968) (discussing that when state placed violent youth with caregivers, state was obligated to inform caregivers regarding youth’s latent, dangerous qualities and that state owed duty to such persons to inform them of peril).

[7] The evidence in this case shows that pursuant to § 009.20B, when preparing for the placement of a child under DHHS’ authority, a DHHS caseworker is to gather certain information and provide that information to the caregiver, including information regarding the child’s tendency to be violent. The

record reflects that one of the purposes behind providing this information is to protect those persons providing care to the child. DHHS regulations also require that the caseworker be present when a child is being placed with the caregiver, to provide necessary information to the caregiver and to answer any questions. Contrary to the regulations, it is undisputed that Hensler was not present when Jeffrey was admitted to Immanuel and that at best, Hensler gave Immanuel generalized information regarding Jeffrey's tendency to be aggressive. It is undisputed that Hensler did not inform Immanuel that Jeffrey had previously assaulted at least 27 people, that he had three separate convictions for assault, or that he was likely to target female staff members. Curry testified that if such information was not provided to Immanuel, DHHS violated its own guidelines. We have previously stated that while violation of a regulation is not negligence per se, it is evidence of negligence. *Goodenow v. State*, 259 Neb. 375, 610 N.W.2d 19 (2000).

The evidence reflects that Immanuel places historical information regarding a patient in the patient's chart, so that individual staff members will have access to that information. Immanuel staff members testified that they rely upon such historical information's being included in the record when treating patients. It is undisputed that Jeffrey's chart at Immanuel did not contain information regarding his numerous placements, his assault convictions, or his propensity to target female staff members. Fuhrman testified that she was not informed that Jeffrey had assaulted 27 individuals, had been convicted of three assaults on caregivers, or would direct his aggression at female staff members, and that had she known this information, she would have handled Jeffrey differently. Given appellants' failure to disclose critical information, what occurred to Fuhrman was a consequence which might reasonably be foreseen. *Sharkey v. Board of Regents*, 260 Neb. 166, 615 N.W.2d 889 (2000); *Knoll v. Board of Regents*, 258 Neb. 1, 601 N.W.2d 757 (1999).

We conclude that under the facts of this case, appellants owed a duty to disclose to Immanuel for the benefit of its employees the critical information appellants possessed regarding Jeffrey's violent and dangerous propensities when Jeffrey was admitted

to Immanuel. DHHS' own regulations required the agency to disclose information regarding Jeffrey's history of violence to his caregivers in order to protect those individuals who were treating him. Additionally, it was reasonably foreseeable that Immanuel staff members, such as Fuhrman, who were in direct contact with Jeffrey, would be and were in fact at significant risk of injury because the information upon which caregivers would rely was not present in Jeffrey's file.

(b) Breach of Duty to Disclose

Appellants claim that the district court erred in determining that they breached their duty to disclose Jeffrey's violent propensities. Referring to the record, appellants assert that Hensler informed Immanuel that Jeffrey had a history of physical aggression and that such declaration satisfied appellants' duty to disclose information.

In a lengthy order, the district court recounted in detail the evidence that was adduced during trial. The district court included in its order a recitation of those facts which favored Fuhrman's case and those facts which favored appellants' defense. In so doing, the district court specifically found that "Hensler did not tell anyone of authority at Immanuel about [Jeffrey]'s history of violence, although she knew he was violent," and that DHHS "had a copy of all of [Jeffrey]'s records . . . but . . . never provided any of the information about [Jeffrey]'s assaults to anybody at Immanuel."

In actions brought pursuant to the State Tort Claims Act, the factual findings of the trial court will not be disturbed on appeal unless they are clearly wrong, and when determining the sufficiency of the evidence to sustain the verdict, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in favor of such party, and it is entitled to the benefit of every inference that can reasonably be deduced from the evidence. *Fu v. State*, 263 Neb. 848, 643 N.W.2d 659 (2002). Given the record in this case, we determine that the district court's factual findings regarding breach are not clearly wrong and that the district court did not err in determining that appellants had breached their duty to disclose information regarding Jeffrey's history of violence.

(c) Efficient Intervening Cause

Appellants claim that even if they did breach their duty to disclose information, their breach was not the proximate cause of Fuhrman's injuries. Instead, appellants claim that Immanuel's familiarity with Jeffrey since his admission to Immanuel and Immanuel's failure to warn and train Fuhrman were efficient intervening causes, and thus appellants' conduct did not proximately cause Fuhrman's injuries.

[8,9] An efficient intervening cause is a new, independent force intervening between the defendant's negligent act and the plaintiff's injury by the negligence of a third person who had full control of the situation, whose negligence the defendant could not anticipate or contemplate, and whose negligence resulted directly in the plaintiff's injury. An efficient intervening cause must break the causal connection between the original wrong and the injury. *Sacco v. Carothers*, 253 Neb. 9, 567 N.W.2d 299 (1997).

[10-12] The doctrine that an intervening act cuts off a tort-feasor's liability comes into play only when the intervening cause is not foreseeable. *Id.*; *Haselhorst v. State*, 240 Neb. 891, 485 N.W.2d 180 (1992). Foreseeability that affects proximate cause relates to the question of whether the specific act or omission of the defendant was such that the ultimate injury to the plaintiff reasonably flowed from the defendant's alleged breach of duty. See *Sacco*, *supra*. We have previously stated that

a defendant cannot be relieved from liability for his or her negligence by the fact that the very harm from which the defendant has failed to protect the plaintiff has occurred. An action that was foreseeably within the scope of the risk occasioned by the defendant's negligence cannot be said to supersede that negligence.

Id. at 15, 567 N.W.2d at 304 (citing W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 44 (5th ed. 1984)).

In the instant case, appellants claim that Immanuel's familiarity with Jeffrey's behavior following his admission to Immanuel and Immanuel's purported failure to warn Fuhrman concerning Jeffrey's assaultive behavior and its purported failure to train Fuhrman in a method to respond to an assault by Jeffrey are efficient intervening causes superseding appellants'

negligent conduct. The error with this argument, however, is that without appellants' disclosure of information regarding Jeffrey's severe and extensive history of attacking his caregivers, his three criminal convictions for assault, and his tendency to target female caregivers, and despite Immanuel's familiarity with Jeffrey's acting out since his admission, Immanuel had insufficient knowledge of its purported need in this case to warn and train Fuhrman to respond to an assault by Jeffrey. Given appellants' failure to disclose Jeffrey's history to his caregivers, Immanuel's alleged failure to warn and train Fuhrman cannot be said to be an independent act that would break the causal connection between appellants' negligence and Fuhrman's injuries.

Based on the foregoing, we conclude that the district court did not err in determining that appellants had breached their duty to disclose information and that such breach was the proximate cause of Fuhrman's injuries and damages. Accordingly, we determine that there is no merit to this assignment of error.

VI. CONCLUSION

For the foregoing reasons, we affirm the district court's judgment in favor of Fuhrman.

AFFIRMED.

MARIA ZAVALA, APPELLANT, V.
CONAGRA BEEF COMPANY, APPELLEE.

655 N.W.2d 692

Filed January 24, 2003. No. S-01-1083.

1. **Workers' Compensation: Appeal and Error.** An appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: _____. Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong.
3. **Workers' Compensation: Statutes: Appeal and Error.** The meaning of a statute is a question of law, and an appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.

4. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficiency of the evidence to support the findings of fact, the evidence must be considered in the light most favorable to the successful party, every controverted fact must be resolved in favor of the successful party, and the successful party will have the benefit of every inference that is reasonably deducible from the evidence.
5. **Workers' Compensation.** As the trier of fact, the compensation court is the sole judge of the credibility of witnesses and the weight to be given their testimony.
6. **Workers' Compensation: Jurisdiction.** The Workers' Compensation Court, as a statutory tribunal, is a court of limited and special jurisdiction and possesses only such authority as is delineated by statute.
7. **Statutes: Appeal and Error.** As an aid to statutory interpretation, appellate courts must look to a statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.
8. **Workers' Compensation: Legislature: Intent.** The Legislature enacted the Nebraska Workers' Compensation Act in order to relieve injured workers from the adverse economic effects caused by a work-related injury or occupational disease.
9. **Workers' Compensation.** An employee's disability as a basis for compensation under Neb. Rev. Stat. § 48-121(1) and (2) (Cum. Supp. 2002) is determined by the employee's diminution of employability or impairment of earning power or earning capacity and is not necessarily determined by a physician's evaluation and assessment of the employee's loss of bodily function.
10. **Workers' Compensation: Words and Phrases.** Earning power, as used in Neb. Rev. Stat. § 48-121(2) (Cum. Supp. 2002), is not synonymous with wages, but includes eligibility to procure employment generally, ability to hold a job obtained, and capacity to perform the tasks of the work, as well as the ability of the worker to earn wages in the employment in which he or she is engaged or for which he or she is fitted.
11. **Workers' Compensation.** Impairments to the body as a whole are compensated in terms of loss of earning power or capacity.
12. _____. When a worker sustains a scheduled member injury and a whole body injury in the same accident, the Nebraska Workers' Compensation Act does not prohibit the court from considering the impact of both injuries in assessing the loss of earning capacity. In making such an assessment, the court must determine whether the scheduled member injury adversely affects the worker such that loss of earning capacity cannot be fairly and accurately assessed without considering the impact of the scheduled member injury upon the worker's employability.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, CARLSON, and MOORE, Judges, on appeal thereto from the Nebraska Workers' Compensation Court. Judgment of Court of Appeals affirmed in part, and in part reversed.

Lee S. Loudon, of Law Office of Lee S. Loudon, P.C., L.L.O., for appellant.

Shirley K. Williams and Joseph A. Wilkins, of Knudsen, Berkheimer, Richardson & Endacott, L.L.P., for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, MCCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

NATURE OF CASE

Maria Zavala petitioned for workers' compensation benefits for injuries she sustained while working for ConAgra Beef Company (ConAgra). The Nebraska Workers' Compensation Court trial judge found that Zavala had sustained a 50-percent loss of earning capacity and awarded her a 2-percent permanent partial impairment status for her right upper extremity as well as vocational rehabilitation benefits. A review panel of the compensation court affirmed the trial judge's decision but eliminated the award of vocational rehabilitation. The Nebraska Court of Appeals reversed the judgment of the review panel and remanded the cause with directions. See *Zavala v. ConAgra Beef Co.*, 11 Neb. App. 235, 647 N.W.2d 656 (2002). We granted ConAgra's petition for further review.

SCOPE OF REVIEW

[1] An appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Vega v. Iowa Beef Processors*, 264 Neb. 282, 646 N.W.2d 643 (2002).

[2] Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Frauendorfer v. Lindsay Mfg. Co.*, 263 Neb. 237, 639 N.W.2d 125 (2002).

[3] The meaning of a statute is a question of law, *Vega v. Iowa Beef Processors*, *supra*, and an appellate court is obligated in workers' compensation cases to make its own determinations as

to questions of law, *Larsen v. D B Feedyards*, 264 Neb. 483, 648 N.W.2d 306 (2002).

FACTS

On October 18, 1999, Zavala was employed as a “head trimmer” at ConAgra’s Monfort plant in Grand Island. She was injured when she picked up a cow’s head and threw it into the garbage. Following the accident, Zavala complained of right shoulder and neck pain and was examined by Dr. Frank Lesiak. Lesiak determined that Zavala had sustained injuries to her cervical spine and right upper extremity as a result of the single accident. Lesiak stated that Zavala’s condition was not directly caused by her employment but was aggravated by the October 1999 accident. Lesiak opined that Zavala received a “7% whole person impairment,” which he stated was the result of a 5-percent impairment to the cervical spine and a 2-percent impairment to the right upper extremity. Lesiak imposed work restrictions and prescribed medication and specialized physical therapy.

In December 1999, Zavala returned to work as a steam vacuum operator. Zavala complained that this job required too much reaching and that as a result, she was experiencing problems in and around her neck and shoulders. In January 2000, Zavala was moved to another job, where she spent 4 hours each day hanging tails and hearts and 4 hours scraping tongues. Zavala and a coworker were subsequently discharged following an incident in which she sliced the coworker’s arm twice.

In April 2000, Zavala petitioned for workers’ compensation benefits for the injuries she sustained in October 1999. Gayle Hope, a vocational counselor, was assigned by the compensation court to provide a loss-of-earning-capacity report for Zavala. Taking into consideration a number of factors, including a 7-percent whole body impairment, Hope concluded that upon obtaining minimal skills in English and vocational services, Zavala would experience a loss of earning capacity of approximately 60 percent. Hope also concluded that if Zavala did not receive vocational services and did not learn to speak minimal English, she would be an odd-lot worker because it was unlikely that she would be able to find employment in Grand Island.

Deborah Determan, a vocational rehabilitation counselor, testified by deposition for ConAgra. Determan opined that Hope's earning-capacity determination was too high because Hope failed to consider that Zavala lost her job with ConAgra because of her wrongful conduct, not her reported injury or inability to perform the job. Determan claimed that Hope's analysis utilized an incorrect average wage of \$12.12 per hour when Zavala's actual base pay at the time of the injury was \$9.25 per hour. She further testified that Hope's analysis was inaccurate to the extent that it was based upon the combination of a scheduled member injury and a whole body injury. It was Determan's opinion that only restrictions related to a whole body injury should be considered in a loss-of-earning-capacity analysis and that such analysis should not include consideration of the effect of a scheduled member injury.

The trial judge concluded that Zavala had sustained a 50-percent loss of earning capacity and a 2-percent permanent partial disability to her right upper extremity as a result of the work-related accident. Zavala was awarded \$161.77 per week for 300 weeks for the 50-percent loss of earning capacity and an additional \$323.53 per week for 4.5 weeks for the 2-percent permanent partial disability to her right upper extremity. Zavala was also awarded vocational rehabilitation benefits.

The trial judge stated that but for Zavala's termination, she could have continued to perform the last position she held. The judge therefore found that Hope's determination that Zavala was an odd-lot worker had been rebutted.

On appeal to the review panel, Zavala argued that the trial judge erred in failing to combine her scheduled member injury and her whole body injury to find her permanently and totally disabled. The review panel found that absent specific statutory authority, such injuries could not be combined to determine permanent and total disability. It affirmed the trial judge's award but eliminated the vocational rehabilitation benefits.

Zavala appealed to the Court of Appeals, which stated:

The trial judge rejected the contention that Zavala was permanently and totally disabled, citing the basic opinions of both Hope and Determan and finding that Hope's opinion that Zavala was limited to being an odd-lot worker had been

rebutted. At least by implication, the trial judge was critical of the fact that Hope had “considered both [Zavala’s] restrictions to the body as a whole and right upper extremity in formulating her opinion that [Zavala] is an odd-lot worker.” For convenience, we shall refer to the combining of member and nonmember impairments to determine loss of earning capacity as “stacking.”

The trial judge does not specifically opine whether stacking of injuries is legally permissible. However, the implication, including the reliance upon Determan’s report criticizing Hope’s methodology, suggests that the trial judge’s position is that such stacking is improper. Nonetheless, the trial judge specifically found, in determining whether Hope’s opinion had been rebutted, that the fact that Zavala “successfully worked for four months in a light duty position with [ConAgra] in and of itself shows that she is not an odd-lot worker.” The trial judge concluded that Zavala had sustained a 50-percent loss of earning capacity, but she ordered vocational rehabilitation, specifically an “English as a Second Language” program.

Zavala v. ConAgra Beef Co., 11 Neb. App. 235, 240, 647 N.W.2d 656, 661 (2002).

The Court of Appeals stated that the trial judge had apparently concluded that Hope had considered both Zavala’s restrictions to the body as a whole and the right upper extremity in formulating her opinion that Zavala was an odd-lot worker. The Court of Appeals concluded that this could be read as a rejection of “stacking” but that it was not clear whether the trial judge’s decision rested on a rejection of “stacking,” a factual finding that Zavala was not an odd-lot worker, or both.

The Court of Appeals resolved the issue by concluding that

[b]ecause the trial judge’s view that stacking is impermissible under Nebraska law appears to have been part of the basis for her finding that Hope’s opinion that Zavala was an odd-lot worker had been rebutted, this matter must be reversed for consideration anew on the record already made of Hope’s opinion in light of our holding that stacking of a member impairment with a whole body injury is permissible. This action is further necessitated because the trial

judge's finding that Hope's opinion had been rebutted is not explained with a clear and concise rationale as required by rule 11.

Moreover, because in our view, the findings of both the trial judge and the review panel concerning Zavala's entitlement to vocational rehabilitation are inextricably intertwined with their positions that stacking is impermissible under Nebraska law, we reverse the decision of the review panel which eliminated the award of vocational rehabilitation and direct that the question of vocational rehabilitation be reconsidered by the trial judge on the record already made in light of our holding about stacking.

Id. at 249-50, 647 N.W.2d at 667-68. We granted ConAgra's petition for further review.

ASSIGNMENTS OF ERROR

In its petition for further review, ConAgra assigns the following errors: The Court of Appeals erred (1) in concluding that a scheduled member injury may be considered with a whole body injury to determine loss of earning capacity and (2) in failing to affirm the trial judge's decision that Zavala was not an odd-lot worker for the reason that the trial judge's opinion clearly stated that "the fact that [Zavala] successfully worked for four months in a light duty position with [ConAgra] in and of itself shows that she is not an odd-lot worker."

ANALYSIS

We first address whether there was sufficient evidence for the trial judge to find that Zavala was not an odd-lot worker. The trial judge concluded that the court-appointed vocational counselor's opinion that Zavala was an odd-lot worker had been rebutted. The trial judge stated that the fact that Zavala successfully worked for 4 months in a light-duty position with ConAgra in and of itself showed that she was not an odd-lot worker.

The Court of Appeals concluded: "Because the trial judge's view that stacking is impermissible under Nebraska law appears to have been part of the basis for her finding that Hope's opinion that Zavala was an odd-lot worker had been rebutted, this matter must be reversed for consideration anew on the record" *Zavala v. ConAgra Beef Co.*, 11 Neb. App. 235, 249-50,

647 N.W.2d 656, 667 (2002). It also determined that the trial judge had not explained her finding with a clear and concise rationale as required by Workers' Comp. Ct. R. of Proc. 11 (2000). We disagree.

[4,5] An appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Vega v. Iowa Beef Processors*, 264 Neb. 282, 646 N.W.2d 643 (2002). Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Frauendorfer v. Lindsay Mfg. Co.*, 263 Neb. 237, 639 N.W.2d 125 (2002). In testing the sufficiency of the evidence to support the findings of fact, the evidence must be considered in the light most favorable to the successful party, every controverted fact must be resolved in favor of the successful party, and the successful party will have the benefit of every inference that is reasonably deducible from the evidence. *Id.* Moreover, as the trier of fact, the compensation court is the sole judge of the credibility of witnesses and the weight to be given their testimony. *Id.*

An odd-lot worker, while not altogether incapacitated for work, is one who is so handicapped that he or she will not be employed regularly in any well-known branch of the labor market. See *Schlup v. Auburn Needleworks*, 239 Neb. 854, 479 N.W.2d 440 (1992). While Zavala was working in her new position, she never missed work due to injury and she never saw a doctor. During that time, Zavala did not report having any trouble performing her job, nor did she request a job change. After 4 months in her new position, Zavala was fired following an incident in which she sliced a coworker's arm twice after the coworker rubbed a cow's tongue on Zavala's posterior.

The trial judge made a factual finding that based on her successful return to work after her injuries, Zavala was not an odd-lot worker. We conclude that the record contains sufficient evidence to support the trial judge's factual finding that Zavala

was not an odd-lot worker, and therefore, the judge's finding was not clearly wrong. The trial judge's rationale was that Zavala had successfully worked for 4 months in the light-duty position with ConAgra. This was a clear and concise statement that complied with rule 11.

We now proceed to determine whether a scheduled member injury should be considered with a whole body injury in calculating loss of earning capacity when both injuries resulted from the same accident. The Court of Appeals determined that the trial judge's apparent rejection of what it referred to as "stacking" and the review panel's outright rejection of "stacking" were so inextricably intertwined with the award that the cause must be remanded for reconsideration on the record already made.

The Court of Appeals held that "Nebraska law does not prohibit consideration of the effect of a member injury when loss of earning capacity is assessed for a worker who also has sustained a whole body injury." *Zavala v. ConAgra Beef Co.*, 11 Neb. App. 235, 249, 647 N.W.2d 656, 667 (2002). In emphasizing that Zavala had two separate areas of injury, arm and cervical spine, which could be considered together to determine the extent of loss of earning capacity, the court explained:

If the combination of the two injuries produces permanent total disability, see *Benish Kaufman v. Control Data*, 237 Neb. 224, 465 N.W.2d 727 (1991), then the Nebraska Workers' Compensation Act does not preclude such an award as a matter of law. And, if the member impairment adversely affects the worker such that loss of earning capacity from the unscheduled injury cannot be fairly and accurately assessed without considering the impact of a scheduled injury on the worker's employability, then stacking is permissible.

Zavala v. ConAgra Beef Co., 11 Neb. App. at 249, 647 N.W.2d at 667.

In its petition for further review, ConAgra argues that the Court of Appeals erred in concluding that a scheduled member injury may be considered with a whole body injury to determine loss of earning capacity. ConAgra asserts that a compensation court cannot award industrial disability benefits that are not explicitly provided for by statute and that no statute confers authority to the

compensation court to award industrial benefits for a scheduled member injury when an employee suffers a whole body injury in the same accident.

[6] The Workers' Compensation Court, as a statutory tribunal, is a court of limited and special jurisdiction and possesses only such authority as is delineated by statute. *Green v. Drivers Mgmt., Inc.*, 263 Neb. 197, 639 N.W.2d 94 (2002). Neb. Rev. Stat. § 48-152 (Reissue 1998) provides in part that the compensation court "shall have authority to administer and enforce all of the provisions of the Nebraska Workers' Compensation Act, and any amendments thereof, except such as are committed to the courts of appellate jurisdiction."

[7] The meaning of a statute is a question of law, *Vega v. Iowa Beef Processors*, 264 Neb. 282, 646 N.W.2d 643 (2002), and an appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law, *Larsen v. D B Feedyards*, 264 Neb. 483, 648 N.W.2d 306 (2002). As an aid to statutory interpretation, appellate courts must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it. *Newman v. Thomas*, 264 Neb. 801, 652 N.W.2d 565 (2002).

[8] The Legislature enacted the Nebraska Workers' Compensation Act (Act) in order to relieve injured workers from the adverse economic effects caused by a work-related injury or occupational disease. *Foote v. O'Neill Packing*, 262 Neb. 467, 632 N.W.2d 313 (2001). It is in light of this beneficent purpose that we have consistently given the Act a liberal construction to carry out justly the spirit of the Act. See *id.*

We stated in *Jeffers v. Pappas Trucking, Inc.*, 198 Neb. 379, 384-85, 253 N.W.2d 30, 33-34 (1977):

Section 48-121 . . . provides for compensation for three categories of job-related disabilities. Subdivision (1) sets the amount of compensation for total disability; subdivision (2) sets the amount of compensation for disability partial in character, except in cases covered by subdivision (3); and subdivision (3) sets out "schedule" injuries to specified parts of the body with compensation established therefore. Disability under subdivisions (1) and (2) refers

to loss of employability and earning capacity, and not to functional or medical loss alone. . . . Thus losses in bodily function, so far as subdivisions (1) and (2) are concerned, are important only insofar as they relate to earning capacity and employability. . . .

For claims falling under subdivision (3), however, it is immaterial whether an industrial disability is present or not. . . . There is, however, an exception to this rule. Where “an employee has suffered a schedule injury to some particular member or members, and some unusual or extraordinary condition as to other members or any other part of the body has developed,” he may be compensated under subdivision (1) or (2) of section 48-121.

(Citations omitted.)

Neb. Rev. Stat. § 48-121 (Cum. Supp. 2002) does not specifically address how compensation is to be established when a worker suffers both a scheduled member injury under subsection (3) and a whole body injury under subsection (2) as a result of a single accident. ConAgra argues that if the Legislature had intended that the compensation court award industrial disability benefits under § 48-121(2) for a scheduled member injury when a worker suffers a whole body injury in the same accident, it would have done so by statute. ConAgra asserts that the absence of a statutory provision specifically granting the compensation court the requisite authority to award such benefits precludes the court from doing so.

We point out that the Act falls short of encompassing all potential factual situations that may occur under the Act. When the Act does not specifically cover a particular event, we have interpreted it in a way that best accomplishes the legislative purpose. See *Foote v. O’Neill Packing*, *supra*. In *Kraft v. Paul Reed Constr. & Supply*, 239 Neb. 257, 475 N.W.2d 513 (1991), we stated that an exception to § 48-121(3) occurs when an injury to a scheduled member results in an unusual or extraordinary condition as to other members or other parts of the body. Under such circumstances, the claimant is entitled to compensation based on lost earning capacity as provided under § 48-121(1) or (2).

Where a statute has been judicially construed and that construction has not evoked an amendment, it is presumed that the

Legislature has acquiesced in the court's determination of the Legislature's intent. *Paulk v. Central Lab. Assocs.*, 262 Neb. 838, 636 N.W.2d 170 (2001). Since the Legislature has not amended § 48-121, we presume that it is in agreement with the court's interpretation of the statute as set forth in *Kraft*.

[9,10] An employee's disability as a basis for compensation under § 48-121(1) and (2) is determined by the employee's diminution of employability or impairment of earning power or earning capacity and is not necessarily determined by a physician's evaluation and assessment of the employee's loss of bodily function. *Frauendorfer v. Lindsay Mfg. Co.*, 263 Neb. 237, 639 N.W.2d 125 (2002). Earning power, as used in § 48-121(2), is not synonymous with wages, but includes eligibility to procure employment generally, ability to hold a job obtained, and capacity to perform the tasks of the work, as well as the ability of the worker to earn wages in the employment in which he or she is engaged or for which he or she is fitted. *Frauendorfer v. Lindsay Mfg. Co.*, *supra*.

[11] In the case at bar, Zavala's back injury is considered to be a whole body injury. Impairments to the body as a whole are compensated in terms of loss of earning power or capacity. *Green v. Drivers Mgmt., Inc.*, 263 Neb. 197, 639 N.W.2d 94 (2002). In order to determine the amount of compensation for Zavala's whole body injury under § 48-121(2), her loss of earning capacity must be assessed.

[12] We conclude that when a worker sustains a scheduled member injury and a whole body injury in the same accident, the Act does not prohibit the court from considering the impact of both injuries in assessing the loss of earning capacity. In making such an assessment, the court must determine whether the scheduled member injury adversely affects the worker such that loss of earning capacity cannot be fairly and accurately assessed without considering the impact of the scheduled member injury upon the worker's employability. If the loss of earning capacity cannot be fairly and accurately assessed without such consideration, then the court is permitted to do so.

For example, when assessing the loss of earning capacity for a back injury, it may not be reasonable to ignore the impact that the loss of a leg would have upon the loss of earning capacity when

both injuries occurred in the same accident. The back injury does not increase the disability to the scheduled member, but the impact of the scheduled member injury should be considered when assessing the loss of earning capacity of the employee. The failure to do so would ignore the realities of the situation.

The Court of Appeals correctly held that when one work accident produces two injuries, one of which is scheduled and the other is unscheduled, it is permissible to consider the impact of the scheduled member injury when assessing loss of earning capacity if the scheduled member injury adversely affects the worker such that loss of earning capacity cannot be fairly and accurately assessed without such consideration.

Zavala sustained a whole body injury to her back and a scheduled member injury to her right upper extremity in the same accident, and therefore, the compensation court may consider her right upper extremity injury in determining the loss of earning capacity that occurred as a result of the single accident. Since we are unable to determine the effect of the trial judge's apparent failure to consider the impact of the scheduled member injury upon the loss of earning capacity assessment in her calculation of the awards of disability and vocational rehabilitation, we remand the cause for further consideration upon the record already made. We do not address the issue of whether a separate award for the scheduled member injury is permitted when considering the scheduled member injury with the whole body injury in the assessment of the loss of earning capacity.

CONCLUSION

For the reasons set forth herein, we conclude that the trial judge was correct in her determination that the vocational counselor's opinion that Zavala was an odd-lot worker had been rebutted. Therefore, we reverse the decision of the Court of Appeals as to that issue.

We affirm that portion of the Court of Appeals' decision which concluded that in a work accident which produces two injuries (one scheduled and one unscheduled), it is permissible under the Act to consider the impact of the scheduled member injury when assessing loss of earning capacity if the scheduled member injury adversely affects the worker such that loss of

earning capacity cannot be fairly and accurately assessed without such consideration. We also affirm the Court of Appeals' decision that the question of vocational rehabilitation shall be reconsidered by the trial judge on the record made in light of the Court of Appeals' determination regarding "stacking."

AFFIRMED IN PART, AND IN PART REVERSED.

STEPHAN, J., not participating.

JAMES MOYER AND SHARON MOYER, APPELLEES, v.
NEBRASKA CITY AIRPORT AUTHORITY, APPELLANT.

655 N.W.2d 855

Filed January 24, 2003. No. S-01-1131.

1. **Summary Judgment: Final Orders: Appeal and Error.** A denial of a motion for summary judgment is not a final order and therefore is not appealable.
2. **Directed Verdict: Evidence: Appeal and Error.** When a motion for directed verdict made at the close of all the evidence is overruled by the trial court, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, and the issues should be decided as a matter of law.
3. **Judgments: Verdicts.** To sustain a motion for judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion.
4. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.
5. **Summary Judgment: Moot Question.** Whether a denial of summary judgment should have been granted generally becomes moot after a full trial on the merits.
6. **Summary Judgment: Appeal and Error.** After trial, the merits should be judged in relation to the fully developed record, not whether a different judgment may have been warranted on the record at summary judgment.
7. **Judgments: Collateral Estoppel: Res Judicata.** The applicability of the doctrines of collateral estoppel and res judicata is a question of law.
8. **Eminent Domain: Damages.** A final condemnation award is conclusive both on questions actually litigated and on questions necessarily within the issues. It is not conclusive in a subsequent action as to remainder damage that was caused by improper construction or operation and that was not actually litigated in the first proceeding.
9. ____: _____. In a condemnation action, there are two elements of damage: (1) market value of the land taken or appropriated and (2) diminution in value of the land remaining, less special benefits.

Appeal from the District Court for Otoe County: RANDALL L. REHMEIER, Judge. Affirmed.

Richard H. Hoch and Jeffrey J. Funke, of Hoch, Funke & Kelch, for appellant.

John W. Voelker for appellees.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

In 1991, as part of a plan to build a new airport, the Nebraska City Airport Authority (Airport Authority) condemned a portion of farmland owned by James Moyer and Sharon Moyer. A jury awarded the Moyers \$82,748. In 1999, the Moyers brought this inverse condemnation action, alleging that in both the initial construction and the subsequent construction of a runway extension, the Airport Authority obstructed and altered existing drainways. The Moyers alleged that improper construction and operation resulted in significant erosion damage to their remaining property. A jury awarded the Moyers \$16,400 in damages, and the Airport Authority appealed.

In this appeal, we determine if the present inverse condemnation action is barred by *res judicata* because of the prior condemnation. Because we determine that the Moyers are seeking to recover for damages caused by improper construction or operation not contemplated in the prior condemnation, *res judicata* does not apply. We also determine that the Moyers presented sufficient evidence to establish improper construction or operation. We affirm.

BACKGROUND

The Airport Authority condemned a portion of a quarter section of farmland owned by the Moyers. The Airport Authority sought 23.1 acres in fee and an aviation easement. A jury entered an award in the amount of \$82,748, including severance damages. The land condemned lies to the north of the remaining Moyer property.

After taking the Moyer property, the Airport Authority began construction on the new airport. The engineers devised a drainage scheme to remove diffused surface water from the airport property. The original design called for drainage channels to be constructed. These channels were to take water to two diversion terraces which would in turn take the water to a natural drainway. This natural drainway cuts across both the Airport Authority property and the Moyer property. After the drainway enters the Moyer property from the north, it carries water diagonally from the northwest to the southeast.

In the original plan, one diversion terrace was to wrap around the southeast end of the runway and take water to the north where it was to be deposited into the natural drainway just before the drainway entered the Moyer property. The other diversion terrace was to carry water to the east and deposit it into the drainway just before the drainway left the Moyer property.

After construction began, James Moyer expressed concern to the Airport Authority that the drainage design would result in damage to his property, but he denied requesting any specific design changes. At some point after this discussion, the drainage scheme was altered. Instead of using the two-diversion terrace design, the Airport Authority implemented a one-diversion terrace design. After draining from the airport, water was taken to the diversion terrace. The diversion terrace began on the east side of the airport. It then wrapped around the south side of the runway, directing water back to the northwest. After it turned to the northwest, the diversion terrace ran between the Moyer property and the runway. Eventually, the diversion terrace emptied into the natural drainway.

As built in the original construction, the diversion terrace meets the natural drainway about 150 feet north of the Moyer property line. In total, 248 acres drain into the natural drainway. Of this total, 36.8 acres drain into the drainway as a result of the diversion terrace.

In 1999, the Airport Authority extended the airport runway. As part of the project, the Airport Authority made the diversion terrace longer, raised its height from 1½ to 3 feet, and widened its bottom.

In October 1999, the Moyers filed an inverse condemnation action under Neb. Rev. Stat. § 76-706 (Reissue 1996) for the appointment of appraisers with the Otoe County Court. The appraisers determined that the Moyers had suffered no damages, and the Moyers appealed to the district court. In their petition on appeal, they claimed that construction at the airport had obstructed and altered existing drainways, resulting in damage to their property. At the pretrial conference, the Moyers were allowed to amend their petition to claim damages that resulted from both the original construction and the construction of the extended runway.

The Airport Authority filed a motion for summary judgment, asserting that as a result of the previous condemnation proceeding, the inverse condemnation action was barred by *res judicata*. The district court denied the motion, reasoning that the initial condemnation action “did not include possible damage to the remainder as a result of claimed additional damage resulting from the use of the property that had been condemned by the Airport Authority.”

At trial, the Moyers claimed that because of the Airport Authority’s construction and operation of the airport, they had suffered two distinct types of damages. First, the Moyers argued that the drainage scheme dumps too much water at too high of a rate into the natural drainway that runs through their property, causing erosion to the drainway. The civil engineer called by the Moyers, Ronald E. Ross, described how the airport has changed the manner in which surface water reaches the natural drainway. Ross testified that the airport construction increased the number of acres draining into the natural drainway by a net of only 2 acres. But, because the airport runways, parking lots, and drainage systems accelerate the velocity at which diffused surface water drains, twice as much water reaches the drainway as previously did. Ross also testified that the diversion terrace has changed where diffused surface water enters into the drainway. As a result, the number of acres that drain into the drainway *before* it reaches the Moyer property has doubled, increasing the volume of water flowing through the drainway as it crosses the Moyer property. Ross also testified that the drainage scheme

used by the airport increased the velocity at which water enters into and flows through the natural drainway.

Ross opined that the increased volume and velocity of water entering into the natural drainway is eroding the drainway. He described cost-efficient methods that the airport could have used to reduce both the volume and the velocity of the surface water entering into the natural drainway.

James Moyer and his son testified that since the construction of the airport, the natural drainway has eroded and that the amount of water in the drainway has increased. Before the airport was constructed, they were able to cross the natural drainway with farming equipment, but now that is impossible. The record shows that the erosion of the natural drainway has worsened since the extension project and will continue to worsen. The Moyers' appraiser testified that the inability to cross the natural drainway has devalued the Moyer property.

The Moyers' second argument, that the airport construction has damaged their property, focused on erosion damage that their fields have suffered since the airport's construction. According to the Moyers, the redesigned diversion terrace does not operate as planned. As a result, water breaches and overflows the terrace during moderate and heavy rainfalls. This water then flows onto the Moyer property, eroding fields that lie south of the airport. Evidence showed that this erosion has worsened since the runway extension project and that it will continue to worsen.

To support their contention about the diversion terrace, the Moyers presented evidence from both Ross and Brian D. Dorsey, a construction manager. Dorsey testified that erosion was present on the diversion terrace itself and on the Moyer fields south of the diversion terrace. He opined that the erosion on the Moyer property resulted from diffused surface water draining from the airport, but the court refused to allow Dorsey to testify whether he believed the construction and design of the drainage scheme were negligently done. Ross testified that the diversion terrace is eroding and that it has breached during heavy rains. He opined that the erosion of both the terrace and the fields will continue.

Both Charles E. Swanson, the engineer who planned the drainage scheme for the initial construction, and Alois Hotovy,

the engineer who planned the runway extension, testified for the Airport Authority. Both claimed that the drainage system they had developed was properly designed and constructed. Contradicting Swanson's testimony, however, Hotovy testified that the original diversion terrace suffered from problems—in particular, an inability to handle large rainfall—resulting in minor erosion to the Moyer property. Moreover, Swanson admitted that if the diversion terrace was operating as designed, it would not be eroded to the extent suggested by the evidence presented by the Moyers.

The Airport Authority moved for directed verdict both at the close of the Moyers' case in chief and at the end of all the evidence. In both motions, it asserted that *res judicata* barred the Moyers' action. It also argued that because of the earlier condemnation action, the Moyers were required to show improper construction or operation of the airport, and that they had failed to do so. The court overruled both motions.

At the jury instruction hearing, the Moyers requested that the jury be given an instruction concerning whether the Airport Authority had violated water laws. The Airport Authority objected, and the trial judge refused to give the instruction. The jury returned a \$16,400 verdict for the Moyers. The court overruled the Airport Authority's motions for a new trial and for judgment notwithstanding the verdict. The Airport Authority appealed.

ASSIGNMENTS OF ERROR

The Airport Authority assigns, restated, that the district court erred in not (1) sustaining the motion for summary judgment and directed verdict because the Moyers' inverse condemnation action was barred by *res judicata*, (2) directing a verdict because the Moyers failed to show improper construction or operation of the airport, and (3) sustaining the motions for a new trial and for judgment notwithstanding the verdict because the verdict was not sustained by the law or the evidence.

STANDARD OF REVIEW

[1] A denial of a motion for summary judgment is not a final order and therefore is not appealable. *McLain v. Ortmeier*, 259 Neb. 750, 612 N.W.2d 217 (2000).

[2] When a motion for directed verdict made at the close of all the evidence is overruled by the trial court, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, and the issues should be decided as a matter of law. *Jay v. Moog Automotive*, 264 Neb. 875, 652 N.W.2d 872 (2002).

[3] To sustain a motion for judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion. *Eyl v. Ciba-Geigy Corp.*, 264 Neb. 582, 650 N.W.2d 744 (2002).

[4] A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion. *Bowley v. W.S.A., Inc.*, 264 Neb. 6, 645 N.W.2d 512 (2002).

ANALYSIS

MOTION FOR SUMMARY JUDGMENT

[5,6] The Airport Authority assigns as error the district court's denial of its motion for summary judgment.

A denial of a motion for summary judgment is an interlocutory order, not a final order, and therefore not appealable. . . .

The denial of a summary judgment motion is neither appealable nor reviewable. Whether a denial of summary judgment should have been granted generally becomes moot after a full trial on the merits. . . . The overruling of a motion for summary judgment does not decide any issue of fact or proposition of law affecting the subject matter of the litigation, but merely indicates that the court was not convinced by the record that there was not a genuine issue as to any material fact or that the party offering the motion was entitled to a judgment as a matter of law. . . . After trial, the merits should be judged in relation to the fully developed record, not whether a different judgment may have been warranted on the record at summary judgment.

(Citation omitted.) *McLain v. Ortmeier*, 259 Neb. at 754-55, 612 N.W.2d at 222. Accordingly, we do not consider whether

the court erred in not granting the Airport Authority summary judgment.

RES JUDICATA

[7,8] Initially, we must determine if res judicata bars the Moyers' current action. The applicability of the doctrines of collateral estoppel and res judicata is a question of law. *McCarson v. McCarson*, 263 Neb. 534, 641 N.W.2d 62 (2002). On several occasions, we have addressed the preclusive effects of a condemnation award on a subsequent eminent domain action that seeks to recover for damages done to the remainder property by the original condemnor. See, e.g., *Hansen v. County of Cass*, 185 Neb. 565, 177 N.W.2d 568 (1970); *Clary v. State*, 171 Neb. 691, 107 N.W.2d 429 (1961); *Snyder v. Platte Valley Public Power and Irrigation District*, 140 Neb. 897, 2 N.W.2d 327 (1942); *Psota v. Sherman County*, 124 Neb. 154, 245 N.W. 405 (1932); *Bunting v. Oak Creek Drainage District*, 99 Neb. 843, 157 N.W. 1028 (1916). In *Hansen v. County of Cass*, 185 Neb. at 567, 177 N.W.2d at 569, we explained:

In an eminent domain proceeding the principle of just compensation for damage to the remainder excludes conjectural items. Yet for all damage to the remainder on account of proper construction or operation the landowner must obtain compensation in the first proceeding. . . . The final condemnation award is conclusive both on questions actually litigated and on questions necessarily within the issues. It is not conclusive in a subsequent action as to remainder damage that was caused by improper construction or operation and that was not actually litigated in the first proceeding. Liability rests upon the original taking or damaging for public use. Recovery is permitted because the new element was not contemplated or determined at the time of the taking or damaging.

(Citations omitted.) Here, the Moyers claim that as a result of improper construction or operation at the airport, they have suffered erosion damage. The Airport Authority argues that the erosion damage suffered by the Moyers could have been contemplated and determined at the time of the original taking. We disagree.

[9-13] In a condemnation action, there are two elements of damage: (1) market value of the land taken or appropriated and (2) diminution in value of the land remaining, less special benefits. *Sorensen v. Lower Niobrara Nat. Resources Dist.*, 221 Neb. 180, 376 N.W.2d 539 (1985) (superseded by statute on other grounds). Damages recoverable in a condemnation case are determined by the extent of the taking and a condemnor's rights actually acquired, not by a condemnor's use resulting from less than full exercise of a right acquired by eminent domain. *Id.* A condemnee, however, cannot recover uncertain, conjectural, or speculative damages. *Enterprise Co., Inc. v. Sanitary Dist. No. One*, 176 Neb. 271, 125 N.W.2d 712 (1964). Thus, *res judicata* bars a subsequent inverse condemnation action which seeks to recover for damages to remainder property which would not have been speculative in the original condemnation action. But when the remainder property actually suffers damages that would have been too speculative to recover in the original condemnation proceedings, the condemnee is not barred from recovering for them in a later inverse condemnation action.

[14,15] In the past, we have been clear that a condemnee is required to anticipate in the original proceedings that the condemnor's contemplated use will alter drainage patterns. See *Snyder v. Platte Valley Public Power and Irrigation District*, *supra*. Thus, any damages that the condemnee will suffer as a result of a properly constructed and operated drainage scheme are not too speculative to recover in the original condemnation proceedings. *Psota v. Sherman County*, 124 Neb. at 157, 245 N.W. at 406 (holding that in original proceeding, condemnee is entitled to all damages which would result from "proper construction, improvement, and maintenance . . . taking into consideration such embankments, cuts, bridges, culverts, and ditches as shall be required . . . for the purpose of a proper construction and maintenance"). Moreover, if a design flaw exists in the drainage scheme planned at the time of the original condemnation proceedings, the flaw is not too speculative to litigate. As a result, the condemnee is charged with any damages that result from a design flaw existing in the drainage scheme at the time of the original condemnation proceedings. See *Snyder v. Platte Valley Public Power and Irrigation District*, 140 Neb. 897, 2 N.W.2d 327 (1942).

[16,17] But, in the original condemnation proceedings, the possibility that the condemnor will not use the proper level of skill in building a well-designed drainage scheme is too speculative to allow recovery. As a result, once damage occurs, recovery can be had in a subsequent action. *Bunting v. Oak Creek Drainage District*, 99 Neb. 843, 157 N.W. 1028 (1916). Similarly, the possibility that the condemnor will abandon its planned drainage scheme and adopt a new, flawed one is too remote to allow recovery in the original proceedings. Thus, if after the condemnation proceedings, the condemnor adopts a new drainage scheme which negligently endangers the condemnee's property, the condemnee is not barred from seeking damages.

Here, the Moyers sought two types of damages. First, they claimed that the drainage scheme used by the airport dumps too much water at too great a velocity into the drainway that crosses their land. The record shows that the Airport Authority changed its drainage scheme after construction began on the project. The Moyers complain that this new scheme was negligently designed. In the original condemnation hearing, the Moyers could not have recovered damages for the mere possibility that the Airport Authority would not use the drainage scheme it had and adopt a new, flawed one. *Res judicata* did not bar the Moyers from attempting to prove that the improper design of the new drainage scheme caused them damage.

For their second category of damages, the Moyers complain that the diversion terrace does not operate as designed. Once again, it would have been too speculative at the time of the original proceedings to allow the Moyers to recover for the possibility that the Airport Authority would not build its drainage scheme in a skillful manner. *Res judicata* does not prevent the Moyers from attempting to show that the diversion terrace was improperly constructed.

IMPROPER CONSTRUCTION OR OPERATION

Even though *res judicata* does not bar the Moyers' inverse condemnation action, the Moyers were still required to prove that their damages resulted from the Airport Authority's improper construction or operation of the airport. See *Clary v. State*, 171 Neb. 691, 107 N.W.2d 429 (1961). The Airport Authority argues

that because the Moyers failed to present any evidence of improper construction or operation, the court erred when it denied the Airport Authority's motions for directed verdict, judgment notwithstanding the verdict, and a new trial.

Initially, the Airport Authority argues that to show improper construction or operation of the airport, the Moyers had to show that the Airport Authority violated the law governing diffused surface water. However, the Airport Authority's theory is inconsistent with the position it took at trial. When the Moyers requested a jury instruction on the law governing diffused surface waters, the Airport Authority objected that the instruction was irrelevant. The trial court agreed with the Airport Authority, and no instruction on diffused surface water was given.

[18,19] Generally, a party cannot complain of error which the party has invited the court to commit. *Kalkowski v. Kalkowski*, 258 Neb. 1035, 607 N.W.2d 517 (2000). Moreover, "[w]hen a theory on any issue is relied upon by a party at the trial as the proper one, it will be adhered to on appeal without regard to its correctness." *Ballantyne v. Parriott*, 172 Neb. 215, 217, 109 N.W.2d 164, 165 (1961). Accordingly, in determining whether the Airport Authority improperly constructed or operated the airport's drainage scheme, we do not consider the law governing diffused surface water.

On the redesign of the drainage scheme, it is undisputed that the Airport Authority used the diversion terrace to redirect where diffused surface water entered the drainway. The Moyers' expert testified that the original airport construction and the subsequent runway extension substantially increased the velocity and volume of water flowing through the drainway as it crossed the Moyers' property. This caused erosion to the drainway. According to the Moyer's expert, cost-efficient engineering techniques were available which would have reduced both the volume and velocity of water entering into the natural drainway and thereby reducing the erosion damage to the drainway. The Airport Authority, however, failed to implement these techniques.

For the construction of the diversion terrace, the record shows that the diversion terrace could not adequately handle all the water it was designed to carry. Evidence suggested that the diversion terrace was not as high as designed in places and that

during heavy rainfalls, the terrace would breach. Moreover, the Moyers presented extensive evidence showing the diversion terrace itself was eroding, and the engineer who redesigned the drainage scheme during the initial construction admitted that if the diversion terrace was operating as designed, this erosion would not be present.

[20,21] The question of improper construction or operation is a factual one to be determined by the jury. See *Robinson v. Central Neb. Public Power & Irrigation District*, 146 Neb. 534, 20 N.W.2d 509 (1945). We would not characterize the evidence of improper construction and operation offered by the Moyers as overwhelming, and we recognize that the Airport Authority presented conflicting evidence. But it was for the jury, as trier of the facts, to resolve conflicts in the evidence and to determine the weight and credibility to be given to the testimony of the witnesses. *Beauford v. Father Flanagan's Boys' Home*, 241 Neb. 16, 486 N.W.2d 854 (1992). Based on the totality of the evidence presented at trial, reasonable minds could have reached the conclusion that the erosion damage suffered by the Moyers resulted from improper construction or operation. Accordingly, the Airport Authority was not entitled to a directed verdict or to judgment notwithstanding the verdict.

Moreover, we cannot say the jury's determination was "so clearly against the weight and reasonableness of the evidence and so disproportionate to the injury proved as to demonstrate that it was the result of passion, prejudice, mistake, or some other means not apparent in the record, or that the jury disregarded the evidence or rules of law." See *id.* at 20, 486 N.W.2d at 857. The district court did not abuse its discretion in denying the Airport Authority a new trial.

CONCLUSION

The Moyers' inverse condemnation action was not barred by res judicata, and the Moyers presented sufficient evidence of improper construction or operation by the Airport Authority to withstand the Airport Authority's motions for directed verdict, judgment notwithstanding the verdict, and a new trial. Accordingly, we affirm.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
DAVID A. BROUILLETTE, APPELLANT.
655 N.W.2d 876

Filed January 24, 2003. No. S-02-014.

1. **Judgments: Pleadings: Appeal and Error.** Regarding questions of law presented by a motion to quash, an appellate court is obligated to reach a conclusion independent of the determinations reached by the trial court.
2. **Motions to Suppress: Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** A trial court's ruling on a motion to suppress evidence, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous.
3. **Rules of Evidence: Appeal and Error.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion.
4. **Judges: Appeal and Error.** The exercise of judicial discretion is implicit in determinations of relevancy, and a trial court's decision regarding it will not be reversed absent an abuse of discretion.
5. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
6. **Criminal Law.** Certain crimes are single crimes that can be proved under different theories, and because each alternative theory is not a separate crime, the alternative theories do not require that the crime be charged as separate alternative counts.
7. **Statutes.** The legal principle of *expressio unius est exclusio alterius* recognizes the general principle of statutory construction that an expressed object of a statute's operation excludes the statute's operation on all other objects unmentioned by the statute.
8. **Homicide: Motor Vehicles: Blood, Breath, and Urine Tests.** The admission of evidence of blood test results in a criminal prosecution for manslaughter under Neb. Rev. Stat. § 28-305 (Reissue 1995) is not authorized under Neb. Rev. Stat. § 60-6,210 (Reissue 1998).
9. **Criminal Law: Evidence: Appeal and Error.** An erroneous admission of evidence is considered prejudicial to a criminal defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt. In a jury trial of a criminal case, harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant.
10. **Verdicts: Juries: Appeal and Error.** Harmless error review looks to the basis on which the jury actually rested its verdict; the inquiry is not whether in a trial that

occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.

11. **Constitutional Law: Arrests: Miranda Rights: Words and Phrases.** *Miranda* warnings are required only where there has been such a restriction on one's freedom as to render one "in custody." One is in custody for *Miranda* purposes when there is a formal arrest or a restraint on one's freedom of movement of the degree associated with such an arrest.
12. **Evidence: Words and Phrases.** Evidence is relevant when it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. If evidence fails to alter the probabilities of the existence or nonexistence of a fact in issue, the evidence is irrelevant.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Matthew Graff, Senior Certified Law Student, for appellant.

Don Stenberg, Attorney General, and Martin W. Swanson for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

I. NATURE OF CASE

David A. Brouillette was convicted in the district court for Lancaster County of two counts of manslaughter. Brouillette was sentenced to 1 to 2 years' imprisonment on the first count and 5 years' probation on the second count and was ordered to pay restitution on both counts. Brouillette appeals his convictions. We affirm.

II. STATEMENT OF FACTS

On the morning of October 23, 1999, on U.S. Highway 77 north of Lincoln, a vehicle driven by Brouillette collided head on with another vehicle, killing the driver and passenger in the other vehicle. Highway 77 is a divided four-lane highway. At the location of the accident, Highway 77 is composed of two lanes northbound and two lanes southbound separated by a grassy median. Brouillette was driving southbound in the westernmost northbound lane when the vehicles collided.

On the night before the accident, Brouillette had gone to a bar in Lincoln where he had had a "couple" of beers. Brouillette met Angela Richards at the bar, and when the bar closed at 1 a.m., Brouillette followed Richards to a party where he drank another beer. At approximately 3 or 3:30 a.m., Brouillette and Richards left the party and drove separately to Richards' home, which was located on the east side of Highway 77 north of Lincoln. Brouillette did not consume any alcohol at Richards' home, and he left her home sometime around 5:30 a.m. In order to leave Richards' home, located to the east side of Highway 77, and go south toward Lincoln, one needed to proceed west and cross over the two northbound lanes and the median before turning left to the south into the southbound lanes.

Laura Boone testified at trial that on the morning of October 23, 1999, she was driving in the southbound lanes of Highway 77 and observed a silver Grand Am driving south in the westernmost lane of the northbound lanes of the divided highway. The driver of the silver Grand Am was later identified as Brouillette. Boone observed a near miss between Brouillette's southbound vehicle and a northbound vehicle. Boone then witnessed a collision on the northbound portion of the divided highway between Brouillette's vehicle and a red Volkswagen. The driver of the red Volkswagen, Daniel Barrett, and the passenger, Jason Reese, were killed as a result of the collision.

Certain rescue workers who came to the scene of the accident testified at trial. A volunteer for the Raymond Fire Department testified that she heard Brouillette tell medical personnel that he had consumed four or five drinks on the previous evening. However, the volunteer did not detect the odor of alcohol on Brouillette's person. Stewart Danburg, a Lancaster County sheriff's deputy, testified that he engaged Brouillette in conversation regarding how the accident happened. Brouillette told Danburg that he did not realize that he was on a four-lane divided highway and instead thought that he was driving south in the correct lane of a two-lane highway. Danburg asked Brouillette if he had consumed any alcohol, and Brouillette responded that he had been drinking the prior evening but had not had anything to drink since midnight. Danburg did not notice the odor of alcohol on Brouillette and did not ask Brouillette to perform any

field sobriety tests. Joseph Gehr, a Lancaster County sheriff's deputy who was trained in accident reconstruction, investigated the scene of the accident. Gehr testified at trial that as a result of his investigation, he determined that the silver Grand Am driven by Brouillette was southbound in the westernmost lane of the northbound lanes at the time of the collision.

Brouillette was taken by helicopter to a hospital in Lincoln. Derek Horalek, another Lancaster County sheriff's deputy, spoke with Brouillette in the emergency room. Horalek testified at trial that he detected an odor of alcohol on Brouillette but did not ask Brouillette to perform any sobriety tests. When Horalek arrived at the emergency room, a laboratory technician was preparing to take a blood sample from Brouillette for medical purposes. Horalek asked the technician to take an additional blood sample for him. Horalek told Brouillette a sample was being taken but did not ask Brouillette's permission. The laboratory technician took both samples at roughly the same time. The sample taken for medical purposes was analyzed to determine blood alcohol content. During its investigation of the present case, the State, asserting its authority under Neb. Rev. Stat. § 60-6,210 (Reissue 1998), obtained the results of the test of the blood sample taken for medical purposes from the hospital.

On January 7, 2000, the State filed an information charging Brouillette with two counts of motor vehicle homicide in violation of Neb. Rev. Stat. § 28-306 (Cum. Supp. 2000). On April 21, the State filed an amended information charging Brouillette with two counts of manslaughter in violation of Neb. Rev. Stat. § 28-305 (Reissue 1995). In each count, the State alleged that Brouillette had caused the death of one of the victims "unintentionally while in the commission of an unlawful act, to-wit: Assault in the Third Degree or Careless Driving or Reckless Driving or Driving While Under Influence of Alcohol or Liquor, or Wrong Way on a One Way."

Brouillette filed a motion to quash the amended information on the basis that it was improper for the State to allege in one count alternative unlawful acts to support a charge of manslaughter. The district court overruled Brouillette's motion to quash.

Brouillette also filed a motion to suppress certain evidence and statements. Among the evidence Brouillette sought to suppress

were his statements made to Danburg at the accident scene, his statements to Horalek in the emergency room, and the results of the tests of both the blood sample taken at Horalek's request and the blood sample taken for medical purposes. The district court sustained Brouillette's motion to suppress as to statements made to Horalek in the emergency room and as to the test results of the blood sample taken at Horalek's direction. The district court overruled the motion to suppress as to statements made to Danburg at the accident scene and as to the test results of the blood sample taken for medical purposes. Regarding the test results of the blood sample taken for medical purposes, the district court limited the use of such evidence to proving the underlying unlawful act of driving under the influence of alcohol and sustained the motion to suppress as to any other use of the evidence, and the jury was advised accordingly.

A jury trial was held beginning September 11, 2001. At trial, Brouillette renewed his objections to admission of his statements to Danburg and to the admission of the test results on the blood sample taken for medical purposes. The district court overruled Brouillette's objections and instructed the jury that it was to consider the blood test evidence only with regard to the allegation of the unlawful act of driving while under the influence of alcohol and not with regard to any other alleged unlawful act. A toxicologist testified regarding the blood test. The toxicologist testified that at the time the blood sample was taken, Brouillette's blood alcohol level was .091 and estimated that the level would have been approximately .106 at the time of the accident, which had occurred about an hour before the blood sample was taken.

In his defense, Brouillette made an offer of proof of certain testimony by the doctor who performed the autopsies on Barrett and Reese, the accident victims. In the offer of proof, the doctor stated that he found marijuana in the pocket of Reese, who was the passenger, and that the urine of Barrett, the driver, tested positive for marijuana and amphetamine. The State objected to Brouillette's proposed evidence on the basis of relevance. The district court sustained the State's objection and disallowed the evidence offered by Brouillette.

In the course of the trial, the State struck “Assault in the Third Degree” from the list of alternative unlawful acts alleged as the predicate for the charges of manslaughter. The district court therefore instructed the jury on the remaining alleged unlawful acts. Brouillette proposed a jury instruction that consisted of the text of Neb. Rev. Stat. § 60-6,131 (Reissue 1998), which provides rules of the road for driving on the right half of roadways. The State objected to Brouillette’s proposed instruction, and the district court refused the instruction. The district court gave an instruction based on Neb. Rev. Stat. § 60-6,141(1) (Reissue 1998), which specifically provides rules of the road for driving on the right-hand roadway of divided highways.

The case was submitted to the jury on September 14, 2001, and the jury returned verdicts of guilty on both counts of manslaughter. The district court sentenced Brouillette on November 27. On the first count, the district court sentenced Brouillette to 1 to 2 years’ imprisonment and ordered him to pay restitution of \$7,290 to Barrett’s parents. On the second count, the district court sentenced Brouillette to 5 years’ probation after serving the sentence on the first count and ordered him to pay restitution of \$1,207.48 to Reese’s mother. Brouillette appeals.

III. ASSIGNMENTS OF ERROR

Brouillette asserts that the district court erred in (1) failing to grant his motion to quash the amended information and allowing the State to charge alternative unlawful acts as the predicate to charges of manslaughter, (2) overruling his motion to suppress evidence of the test results of the blood sample taken for medical purposes and admitting such evidence at trial, (3) overruling his motion to suppress evidence of statements he made to Danburg at the scene of the accident and admitting such evidence at trial, (4) sustaining the State’s objection and refusing to admit evidence of drugs found on Barrett and Reese, and (5) failing to give his proposed jury instruction based on § 60-6,131.

IV. STANDARDS OF REVIEW

[1] Regarding questions of law presented by a motion to quash, an appellate court is obligated to reach a conclusion independent

of the determinations reached by the trial court. *State v. Hynek*, 263 Neb. 310, 640 N.W.2d 1 (2002).

[2] A trial court's ruling on a motion to suppress evidence, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. *State v. Faber*, 264 Neb. 198, 647 N.W.2d 67 (2002).

[3] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion. *State v. Harris*, 263 Neb. 331, 640 N.W.2d 24 (2002).

[4] The exercise of judicial discretion is implicit in determinations of relevancy, and a trial court's decision regarding it will not be reversed absent an abuse of discretion. *State v. Davlin*, 263 Neb. 283, 639 N.W.2d 631 (2002).

[5] To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *State v. Nesbitt*, 264 Neb. 612, 650 N.W.2d 766 (2002).

V. ANALYSIS

1. DENIAL OF MOTION TO QUASH: ALTERNATIVE UNLAWFUL ACTS TO SUPPORT MANSLAUGHTER CHARGES

In his first assignment of error, Brouillette contends that the district court erred in denying his motion to quash the amended information. Brouillette was charged with two counts of manslaughter under § 28-305, which defines manslaughter as killing another unintentionally "while in the commission of an unlawful act." The amended information sets forth predicate unlawful acts as to each count in the alternative. Brouillette asserts that Nebraska law does not allow the State to allege

alternative unlawful acts as the predicate to a single count in an information charging manslaughter. He argues that § 28-305 requires that a defendant be charged in separate counts, each based on a separate unlawful act such that the jury is required to return a separate verdict on each count. Brouillette further argues that various prior opinions of this court which tend to contradict the arguments he asserts are distinguishable.

[6] The State does not agree with Brouillette's contention. The State argues that the amended information was proper under § 28-305 and that the issue raised by Brouillette is controlled by *Schluter v. State*, 153 Neb. 317, 44 N.W.2d 588 (1950), and other cases, such as *State v. West*, 217 Neb. 389, 350 N.W.2d 512 (1984), and *State v. Brunzo*, 262 Neb. 598, 634 N.W.2d 767 (2001). The State notes that in *West* and *Brunzo*, this court has made clear that certain crimes are single crimes that can be proved under different theories, and that because each alternative theory is not a separate crime, the alternative theories do not require that the crime be charged as separate alternative counts. We agree with the State's analysis and reject Brouillette's argument.

Schluter, *supra*, involved a challenge to the jury instructions in a manslaughter case. In analyzing the primary issue on appeal in *Schluter*, this court observed that the State was not required to specify in the information upon what particular unlawful act a count of manslaughter was based or, if specified, to thereafter elect upon which of several alleged unlawful acts a prosecution for manslaughter was based. We stated that because the State was not required to specify the particular unlawful act, such specification in the information was mere "surplusage" which did not render the information defective. *Id.* at 324, 44 N.W.2d at 593. Brouillette attempts to distinguish *Schluter* by noting that *Schluter* was based on an earlier version of the manslaughter statute, Neb. Rev. Stat. § 28-403 (Reissue 1975), which defined "manslaughter" as killing another unintentionally "while the slayer is in the commission of *some* unlawful act," whereas the current manslaughter statute, § 28-305, defines "manslaughter" as killing another unintentionally "while in the commission of *an* unlawful act." (Emphasis supplied.) Brouillette asserts that although "some" in the old statute may be read to encompass a number of unlawful

acts, the Legislature's abandonment of the phrase "some unlawful act" in favor of "an unlawful act" exhibits an intent to define manslaughter as an unintentional death that results during the commission of a single identified unlawful act. Brouillette further argues that under the current manslaughter statute, § 28-305, each alleged unlawful predicate act supports a distinct count of manslaughter and that a proper information should allege each unlawful act as supporting a separate count of manslaughter.

West, supra, involved motor vehicle homicide and a challenge to the form of verdict. In *West*, the defendant was convicted of motor vehicle homicide in violation of § 28-306, which made it a crime to cause "the death of another unintentionally while engaged in the operation of a motor vehicle in violation of the law of the State of Nebraska." The defendant contended on appeal that the verdict returned by the jury which did not specify the underlying "violation of the law" was unclear and ambiguous and that he was therefore entitled to a new trial. In rejecting the defendant's argument, this court noted that based on the charges in the information and the evidence presented at trial, the jury could have found that the defendant operated a motor vehicle in violation of the law in one of three ways: (1) while under the influence of alcoholic liquor, or (2) when he had more than the legal limit of alcohol in his body fluids, or (3) in a reckless manner. We recognized that each of the three acts recited above which were mentioned in the information constituted a distinct violation of the law but determined that only the single offense of motor vehicle homicide was charged against the defendant and that the offense of motor vehicle homicide was a single crime which may be committed in a number of ways. In *West*, we concluded that "[w]here one is charged with the commission of a crime which may be committed in a number of ways, a general verdict finding the defendant guilty of the crime charged is sufficient and is not ambiguous." 217 Neb. at 398, 350 N.W.2d at 519. Implicit in the reasoning in *West* is the acknowledgment that the information charging the single offense of motor vehicle homicide was not improper.

In *State v. Brunzo*, 262 Neb. 598, 634 N.W.2d 767 (2001), the defendant had been convicted of first degree murder in violation of Neb. Rev. Stat. § 28-303 (Reissue 1989). In a motion for postconviction relief, the defendant alleged that the information charging him was legally defective and that his counsel was ineffective for having failed to move to quash the information. The district court denied postconviction relief, and we affirmed. The information charging Brunzo with first degree murder recited the language of § 28-303 and specified the felonies of robbery, kidnapping, and/or criminal attempt as the basis for felony murder. The information did not set out the elements of the underlying felonies. We concluded that the information charging the defendant gave him “fair notice of the charges he would face and the crime he was later convicted of.” 262 Neb. at 606, 634 N.W.2d at 774. The crime of first degree murder under § 28-303 constitutes one offense even though there may be alternative theories by which criminal liability for first degree murder may be charged and prosecuted. *State v. White*, 254 Neb. 566, 577 N.W.2d 741 (1998). One such theory is felony murder. *Id.* The felony which serves as the predicate for felony murder in turn may be based on allegations of alternative facts. Explicit in *Brunzo* is the approval of the information charging the single offense of first degree murder under the theory of felony murder, where the predicate felonies are alleged in the alternative.

The logic of *Schluter v. State*, 153 Neb. 317, 44 N.W.2d 588 (1950); *State v. West*, 217 Neb. 389, 350 N.W.2d 512 (1984); and *Brunzo*, *supra*, applies to the instant case. In this regard, we conclude that the change in the language of the statutory definition of “manslaughter” from “some unlawful act” to “an unlawful act” did not vitiate the holding in *Schluter*. We further observe that manslaughter under § 28-305, similar to the crime of motor vehicle homicide in *West*, is a single crime which may be committed in a number of ways. Finally, as in *Brunzo*, the information in the present case which pled the predicate acts in the alternative gave Brouillette “fair notice of the charges he would face and the crime[s] he was later convicted of,” see 262 Neb. at 606, 634 N.W.2d at 774, and was not defective. The district court therefore did not err in overruling Brouillette’s motion to quash

the information, and we reject Brouillette's first assignment of error.

2. DENIAL OF MOTIONS TO SUPPRESS EVIDENCE

In his second assignment of error, Brouillette asserts that the district court erred in denying his motion to suppress and in admitting at trial evidence of the test results from the blood sample that was taken for medical purposes. We note that the blood sample taken at Horalek's direction, having been suppressed, is not at issue on appeal. In his third assignment of error, Brouillette asserts that the district court erred in denying his motion to suppress and in admitting at trial evidence of statements that he made to Danburg at the accident scene. We analyze these two assignments of error separately.

(a) Admission of Results of Blood Test

With respect to the admission of the results from the blood sample taken for medical purposes, Brouillette argues that the evidence was not admissible pursuant to § 60-6,210 because that statute allows for admission of such evidence only in a criminal prosecution for driving under the influence under Neb. Rev. Stat. § 60-6,196 (Supp. 1999). Section 60-6,210(1) generally provides that the test results of a blood sample taken for medical purposes "shall be admissible in a criminal prosecution under section 60-6,196 [driving under the influence] to show the alcoholic content of or the presence of drugs or both in the blood at the time of the accident." Brouillette argues that § 60-6,210 does not provide for the use of such evidence in a criminal prosecution for manslaughter under § 28-305, such as in the present case. The State argues in response that the evidence is admissible under § 60-6,210 in a prosecution for manslaughter in order to prove the underlying unlawful act of driving under the influence, which is a violation of § 60-6,196. We reject the State's analysis of § 60-6,210(1).

[7,8] The substance of § 60-6,210(1) relates to the admission of the results of "a chemical" test where the sample has been obtained for the purpose of medical treatment. The blood test results at issue on the appeal of this case were obtained from a sample taken for medical purposes. The terms of § 60-6,210(1) provide for the admissibility of such test results "in a criminal

prosecution under section 60-6,196 [driving under the influence] to show the alcoholic content of or the presence of drugs or both in blood.” The plain language of § 60-6,210(1) limits the use of the test results obtained for medical purposes to a prosecution for driving under the influence. The legal principle of *expressio unius est exclusio alterius* recognizes the general principle of statutory construction that an expressed object of a statute’s operation excludes the statute’s operation on all other objects unmentioned by the statute. See, *Pfizer v. Lancaster Cty. Bd. of Equal.*, 260 Neb. 265, 616 N.W.2d 326 (2000). Pursuant to the statute and this principle, the admission of the evidence of the blood test results in the instant criminal prosecution for manslaughter under § 28-305 was not authorized under § 60-6,210 and was error.

[9,10] An erroneous admission of evidence is considered prejudicial to a criminal defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt. *State v. Sheets*, 260 Neb. 325, 618 N.W.2d 117 (2000). In a jury trial of a criminal case, harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant. *State v. Kula*, 260 Neb. 183, 616 N.W.2d 313 (2000). Harmless error review looks to the basis on which the jury actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error. *State v. Trotter*, 262 Neb. 443, 632 N.W.2d 325 (2001).

In the present case, the State alleged that Brouillette caused the death of another unintentionally while in the commission of any one or more of the unlawful acts of driving under the influence, careless driving, reckless driving, or driving in the wrong direction. Guilt of manslaughter must be supported by an underlying unlawful predicate act. The jury need find but one predicate act established by the evidence. While the trial court limited the use of the blood test result and instructed the jury to limit its use, the undisputed evidence established that Brouillette was driving in the wrong direction. Therefore, we conclude that the verdict was surely unattributable to the erroneous admission of the blood test.

The testimony of the witness Boone and of the accident reconstructionist, Gehr, established without contradiction that Brouillette was driving southbound in the northbound lanes of the divided Highway 77. Although Brouillette stated he was unaware that he was proceeding in the wrong direction, he does not dispute the fact that he was driving southbound in the northbound lane. The evidence clearly supports a finding that Brouillette was committing the unlawful predicate act of driving in the wrong direction by proceeding south in the northbound lanes of a divided highway. There was no evidence upon which the jury could have found that Brouillette was not driving in the wrong direction.

In view of the record and facts of this case, we conclude that the guilty verdict rendered in this trial was surely unattributable to the erroneous admission of the blood test. See *Trotter, supra*. We therefore conclude that the error in admitting the blood test evidence was harmless error.

(b) Admission of Statements at Accident Scene

With respect to the admission of Brouillette's statements made to Danburg at the accident scene, Brouillette argues such evidence was obtained in violation of his constitutional rights because he was in custody and was subjected to interrogation without first being advised of his *Miranda* rights. Among the statements Brouillette made to Danburg was an admission that he had been drinking the night before the accident. The State argues in response that Brouillette was not yet in custody at the time he made the statements. We agree with the State.

[11] It is well settled that *Miranda* warnings are required only where there has been such a restriction on one's freedom as to render one "in custody." One is in custody for *Miranda* purposes when there is a formal arrest or a restraint on one's freedom of movement of the degree associated with such an arrest. *State v. Burdette*, 259 Neb. 679, 611 N.W.2d 615 (2000). Brouillette was not in custody when Danburg questioned him at the accident scene. See *State v. Melton*, 239 Neb. 506, 476 N.W.2d 842 (1991) (defendant was not in custody when he was not under formal arrest and was questioned by officers during routine course of accident investigation). Brouillette's second and third assignments of error are without merit.

3. EXCLUSION OF EVIDENCE OF DRUGS ON BARRETT AND REESE

In his fourth assignment of error, Brouillette asserts that the district court erred in refusing to admit evidence he offered to establish that marijuana was found in the pocket of Reese, the passenger, and that marijuana and amphetamine were found in the urine of Barrett, the driver. Citing to various cases not repeated here, Brouillette argues that the excluded evidence would show that Barrett was driving under the influence of drugs and that the excluded evidence was relevant to establish that Barrett was negligent and that such negligence contributed to the accident. The State objected to such evidence on the basis of relevance, and the district court sustained the State's objection. The district court did not abuse its discretion in so ruling.

[12] Evidence is relevant when it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *State v. Davlin*, 263 Neb. 283, 639 N.W.2d 631 (2002). If evidence fails to alter the probabilities of the existence or nonexistence of a fact in issue, the evidence is irrelevant. *Id.* The exercise of judicial discretion is implicit in determinations of relevancy, and a trial court's decision regarding it will not be reversed absent an abuse of discretion. *Id.*

The uncontradicted evidence in the present case established that Brouillette was driving in the wrong direction and that proceeding in such a manner caused the accident. Given the evidence, it was not an abuse of discretion for the district court to conclude that the proffered evidence that Reese had drugs on his person and that Barrett had drugs in his urine was not relevant. The proposed evidence does not negate evidence that Brouillette's actions caused the deaths of Barrett and Reese. The presence of drugs on Barrett and Reese could not be the sole proximate cause of the accident where the record establishes without dispute that Brouillette was driving in the wrong direction on the divided highway. See *State v. Brown*, 258 Neb. 330, 603 N.W.2d 419 (1999).

We conclude that the district court did not abuse its discretion by excluding the evidence offered by Brouillette on the basis of

relevance. We therefore reject Brouillette's fourth assignment of error.

4. REFUSAL OF JURY INSTRUCTION

BASED ON § 60-6,131

In his final assignment of error, Brouillette asserts that the district court erred in refusing his proposed instruction based on § 60-6,131. The statute and the proposed instruction read:

(1) Upon all roadways of sufficient width, a vehicle shall be driven upon the right half of the roadway except as follows:

(a) When overtaking and passing another vehicle proceeding in the same direction under the rules governing such movement;

(b) When an obstruction exists making it necessary to drive to the left of the center of the highway, except that any person so doing shall yield the right-of-way to all vehicles traveling in the proper direction upon the unobstructed portion of the highway within such distance as to constitute an immediate hazard;

(c) Upon a roadway divided into three marked lanes for traffic under the rules applicable thereon; or

(d) Upon a roadway restricted to one-way traffic.

(2) Upon all roadways, any vehicle proceeding at less than the normal speed of traffic at the time and place and under the conditions then existing shall be driven in the right-hand lane then available for traffic, or as close as practicable to the right-hand curb or edge of the roadway, except when overtaking and passing another vehicle proceeding in the same direction or when preparing for a left turn at an intersection or into a private road or driveway.

(3) Upon any roadway having four or more lanes for moving traffic and providing for two-way movement of traffic, no vehicle shall be driven to the left of the center-line of the roadway except when authorized by official traffic control devices designating certain lanes to the left side of the center of the roadway for use by traffic not otherwise permitted to use such lanes or except as permitted under subdivision (1)(b) of this section. This subsection

shall not be construed to prohibit the crossing of the centerline in making a left turn into or from an alley, private road, or driveway unless such movement is otherwise prohibited by signs.

To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *State v. Nesbitt*, 264 Neb. 612, 650 N.W.2d 766 (2002). Brouillette argues that an instruction based on § 60-6,131 was warranted by the evidence in this case because, he asserts, the evidence establishes that Barrett was driving in the left or westernmost lane of the northbound lanes of divided Highway 77 in violation of § 60-6,131(3). Although the evidence establishes that Barrett was driving in the left or westernmost lane of the northbound lanes, driving in such a manner is not a violation of § 60-6,131(3), and therefore the rule of the road enunciated in § 60-6,131(3) has no application to this case.

The evidence established that Highway 77 at the site of the collision was a four-lane divided highway. Section 60-6,141, rather than § 60-6,131, was applicable to the highway at the site of the accident and to the issues in the present case. Section 60-6,141(1) states, "Whenever any highway has been divided into two or more roadways by a median, a driver shall drive only upon the right-hand roadway unless directed or permitted to use another roadway by traffic control devices or competent authority." The jury was given an instruction based on § 60-6,141(1).

Because Brouillette's proposed instruction was not warranted by the evidence, the district court did not err in refusing to give the proposed instruction. We therefore reject Brouillette's final assignment of error.

VI. CONCLUSION

We conclude that the amended information in the present case was not defective in listing alternative unlawful acts to support manslaughter charges and that the district court therefore did not err in denying Brouillette's motion to quash the information. We conclude that admission of evidence of the test results of the

blood sample taken for medical purposes was harmless error. We conclude that admission of evidence of Brouillette's statements to Danburg was not error. We further conclude that the district court did not err in sustaining the State's relevance objection to Brouillette's evidence of drugs found on Barrett and Reese and that the district court did not err in refusing Brouillette's proposed instruction based on § 60-6,131. Having rejected each of Brouillette's assignments of error, we affirm.

AFFIRMED.

STEPHAN, J., concurring.

In my opinion, the results of the blood test would have been admissible under Neb. Rev. Stat. § 60-6,210(1) (Reissue 1998) if Brouillette had been tried for felony motor vehicle homicide as defined in Neb. Rev. Stat. § 28-306(3)(b) or (c) (Cum. Supp. 2000), because both of those sections require proof of the operation of a motor vehicle in violation of Neb. Rev. Stat. § 60-6,196 (Supp. 1999). However, because the State amended the charges from motor vehicle homicide to manslaughter, which does not specifically require proof of violation of § 60-6,196, I agree with the majority that the blood tests were not admissible under § 60-6,210(1).

The amendment of the charges prior to trial also affects the harmless error analysis. In *State v. Roth*, 222 Neb. 119, 382 N.W.2d 348 (1986), *disapproved on other grounds*, *State v. Wright*, 261 Neb. 277, 622 N.W.2d 676 (2001), this court held that where death results from the unlawful operation of a motor vehicle, a prosecutor has discretion to charge the operator with either motor vehicle homicide in violation of § 28-306 or manslaughter in violation of Neb. Rev. Stat. § 28-305 (Reissue 1995). The harmless error analysis in this case demonstrates the breadth of that discretion.

As the majority notes, there was undisputed evidence that Brouillette was proceeding south in the northbound lanes of a divided highway at the time of the fatal accident. This was a violation of the Nebraska Rules of the Road, specifically Neb. Rev. Stat. § 60-6,141(1) (Reissue 1998). In the absence of a fatality, this conduct would have constituted a "traffic infraction" punishable by a fine. Neb. Rev. Stat. §§ 60-672, 60-682, and 60-689 (Reissue 1998).

But, tragically, fatalities did result from Brouillette's traffic infraction. Had he been tried under the motor vehicle homicide statute, as originally charged, proof that he violated § 60-6,141(1) could have supported only the conviction of two Class I misdemeanors, each punishable by not more than 1 year's imprisonment, a \$1,000 fine, or both. Neb. Rev. Stat. §§ 28-106 (Cum. Supp. 2000) and 28-306(1) and (2). Motor vehicle homicide is a Class I misdemeanor unless it results from reckless driving, willful reckless driving, or first-offense driving under the influence, in which case it is a Class IIIA felony punishable by a maximum of 5 years' imprisonment, a \$10,000 fine, or both. Neb. Rev. Stat. § 28-105 (Cum. Supp. 2002); § 28-306(3)(a) and (b). If death results from a second or subsequent offense of driving under the influence, motor vehicle homicide constitutes a Class III felony punishable by 20 years' imprisonment, a \$25,000 fine, or both. §§ 28-105 and 28-306(3)(c). Thus, the Legislature designed the offense of motor vehicle homicide to increase in severity from a Class I misdemeanor to a Class III felony, depending upon the seriousness of the predicate offense involving the operation of a motor vehicle. But manslaughter, a Class III felony, can be established by proof that the defendant, acting without malice, "causes the death of another unintentionally while in the commission of an unlawful act." § 28-305. Brouillette's traffic infraction, driving the wrong way on a divided highway, was unquestionably an "unlawful act," even if it resulted from an error as to the nature of the roadway, as he contended. While it would not be sufficient to support a charge of felony motor vehicle homicide, it is sufficient to support a charge of manslaughter.

This seems anomalous. If the Legislature intended to make motor vehicle homicide a felony only in the circumstance where death results from what are arguably the three most serious offenses involving the operation of a motor vehicle, why would a less serious traffic infraction resulting in death be sufficient to establish manslaughter, a felony equivalent in degree to the most serious variant of felony motor vehicle homicide? We need not and indeed cannot answer this question, because regardless of whether predicating manslaughter on a traffic infraction seems logical or just, it is permissible under current law. If the language of a statute is clear, the words of such statute are the end of any

judicial inquiry. *State v. Rhea*, 262 Neb. 886, 636 N.W.2d 364 (2001). Generally, where a statute has been judicially construed and that construction has not evoked an amendment, it will be presumed that the Legislature has acquiesced in the court's determination of the Legislature's intent. *State v. Neiss*, 260 Neb. 691, 619 N.W.2d 222 (2000). In the nearly 17 years since *State v. Roth*, 222 Neb. 119, 382 N.W.2d 348 (1986), was decided, the Legislature has not amended § 28-305 to exclude traffic infractions from the universe of "unlawful acts" which can be the basis of a manslaughter conviction. Moreover, the Legislature repealed former Neb. Rev. Stat. § 39-669.20 (Reissue 1984), which this court applied in *Roth* to impose a limitation on the permissible sentence for manslaughter resulting from the operation of a motor vehicle. 1986 Neb. Laws, L.B. 153; *State v. Roth*, *supra*. Accordingly, the majority's harmless error analysis is a correct application of the law, in which I must concur.

WRIGHT and GERRARD, JJ., join in this concurrence.

STATE OF NEBRASKA, APPELLANT, V.

MICHAEL W. LOYD, APPELLEE.

655 N.W.2d 703

Filed January 24, 2003. No. S-02-305.

1. **Statutes.** The meaning of a statute is a question of law.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
3. **Municipal Corporations: Ordinances: Statutes.** The power of a municipality to enact and enforce any ordinance must be authorized by state statute.
4. ____: ____: _____. A city may not pass legislation which conflicts, or is inconsistent, with state law.
5. **Statutes: Ordinances.** An ordinance may not permit or license that which a statute forbids or prohibits, and vice versa.
6. ____: _____. Where there is a direct conflict between an ordinance and a state statute, the statute is superior law.
7. ____: _____. A city ordinance is inconsistent with a statute if it is contradictory in the sense that the two legislative provisions cannot coexist.
8. ____: _____. When an ordinance is inconsistent with statutory law, it is unenforceable.

Appeal from the District Court for Douglas County, GREGORY M. SCHATZ, Judge, on appeal thereto from the County Court for Douglas County, LYN V. WHITE, Judge. Exception overruled.

Paul D. Kratz, Omaha City Attorney, Martin J. Conboy III, Omaha City Prosecutor, and David F. Smalheiser for appellant.

David W. Jorgensen, of Nye, Hervert, Jorgensen & Watson, P.C., for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

The State takes exception under Neb. Rev. Stat. § 29-2319(3) (Reissue 1995) to the district court's order affirming the county court's granting of a motion to quash. The county court determined that the penalty provisions of the Omaha Mun. Code, ch. 36, art. III, § 36-115 (1998), were inconsistent with the penalty provisions of Neb. Rev. Stat. § 60-6,196 (Cum. Supp. 2000). We agree that the provisions are inconsistent and overrule the State's exception.

BACKGROUND

The appellee, Michael W. Loyd, was charged in county court with second-offense driving under the influence (DUI) under § 36-115 of the Omaha Municipal Code. Loyd moved to quash the complaint because § 36-115 was inconsistent with § 60-6,196. A person convicted under § 36-115 of the code and placed on probation must serve 48 hours in county jail. A person convicted under § 60-6,196, however, must pay a \$500 fine and either be confined for 5 days or perform at least 240 hours of community service. The county court determined that the ordinance was not in conformity with the statute and granted the motion to quash. The district court affirmed.

ASSIGNMENT OF ERROR

The State assigns, rephrased, that the district court erred by affirming the county court's granting of the motion to quash.

STANDARD OF REVIEW

[1,2] The meaning of a statute is a question of law. *Vega v. Iowa Beef Processors*, 264 Neb. 282, 646 N.W.2d 643 (2002). When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Eyl v. Ciba-Geigy Corp.*, 264 Neb. 582, 650 N.W.2d 744 (2002).

ANALYSIS

The State contends that the city had the authority to enact an ordinance requiring a period of confinement different than the punishment enacted in § 60-6,196. The State argues that § 36-115 of the code is in conformance with § 60-6,196 because although the Legislature intended that the element of the crimes be the same, it did not require that the punishments be the same.

Under § 60-6,196, second-offense DUI is a Class W misdemeanor, which carries a maximum penalty of 90 days' imprisonment and a \$500 fine and a mandatory minimum of 30 days' imprisonment and a \$500 fine. Section 60-6,196(2)(b) further provides:

If the court places such person on probation or suspends the sentence for any reason, the court shall, as one of the conditions of probation or sentence suspension, order such person not to drive any motor vehicle in the State of Nebraska for any purpose for a period of one year from the date of the order unless otherwise authorized by an order issued pursuant to section 60-6,211.05 and shall issue an order pursuant to section 60-6,197.01 with respect to all motor vehicles owned by such person, and such order of probation shall also include, as conditions, the payment of a five-hundred-dollar fine and either confinement in the city or county jail for five days or the imposition of not less than two hundred forty hours of community service.

Neb. Rev. Stat. § 60-6,197(8) (Cum. Supp. 2000) provides:

Any city or village may enact ordinances in conformance with this section. Upon conviction of any person of a violation of such city or village ordinance, the provisions of this section with respect to the operator's license of such person shall be applicable the same as though it were a violation of this section.

In addition, Neb. Rev. Stat. § 14-102.01 (Reissue 1997) authorizes cities to enact ordinances for a variety of purposes that are not inconsistent with the general laws.

Under § 36-115 of the Omaha Municipal Code, a person convicted of second-offense DUI must be sentenced to 30 to 90 days in jail and pay a \$500 fine. Section 36-115(b) further provides:

If the court places such person on probation or suspends the sentence for any reason, the court shall, as one of the conditions of probation or sentence suspension, order such person not to drive any motor vehicle in the State of Nebraska for any purpose for a period of six months from the date of the order. One of the probation's conditions shall be confinement in the county jail for 48 hours.

[3-8] The power of a municipality to enact and enforce any ordinance must be authorized by state statute. *Jacobson v. Solid Waste Agency of Northwest Neb.*, 264 Neb. 961, 653 N.W.2d 482 (2002). Thus, a city may not pass legislation which conflicts, or is inconsistent, with state law. *State v. Salisbury*, 7 Neb. App. 86, 579 N.W.2d 570 (1998). An ordinance may not permit or license that which a statute forbids or prohibits, and vice versa. *Id.* Where there is a direct conflict between an ordinance and a state statute, the statute is superior law. *Jacobson, supra*. A city ordinance is inconsistent with a statute if it is contradictory in the sense that the two legislative provisions cannot coexist. *Arrow Club, Inc. v. Nebraska Liquor Control Commission*, 177 Neb. 686, 131 N.W.2d 134 (1964). When an ordinance is inconsistent with statutory law, it is unenforceable. See, *id.*; *State v. Kubik*, 159 Neb. 509, 67 N.W.2d 755 (1954).

Here, § 36-115 of the code is inconsistent with § 60-6,196 because it requires a different punishment for a defendant charged with second-offense DUI who is placed on probation. Under § 60-6,196, a defendant placed on probation must pay a \$500 fine and either be confined for 5 days or serve 240 hours of community service. The defendant must also be ordered not to drive for a period of 1 year. Section 36-115 does not mandate a fine for a defendant placed on probation, but does require 48 hours of confinement. It also requires that the defendant be ordered not to drive for a period of only 6 months. Thus, each provision mandates a different sentence. When two provisions

require the trial court to impose different sentences, the provisions cannot coexist and the ordinance is unenforceable.

The State argues that the Legislature intended that the term “conformance” in § 60-6,196(7) applies only to the elements of the crime. But § 60-6,196(7) plainly refers to “this section” which encompasses all of § 60-6,196. It does not contain the limitation suggested by the State and does not give municipalities the power to enact ordinances with penalties that differ from the statute.

The State also argues that the ordinance is enforceable because it is less punitive than the statute. The question, however, is not whether one provision is more punitive than the other. Instead, we look only to whether the provisions are inconsistent. Further, whether one provision is more punitive than the other would vary based on the subjective view of any given defendant. Some people could find the prospect of any amount of jail time so distasteful that any punishment that did not include it would be less punitive. Others might view 48 hours in jail as less punitive than 240 hours of community service.

We determine that the provisions of § 60-6,196 of the Nebraska Revised Statutes and § 36-115 of the Omaha Municipal Code, as they apply to charges of second-offense DUI, are inconsistent and cannot coexist. Thus, § 36-115 of the Omaha Municipal Code is unenforceable.

EXCEPTION OVERRULED.

BRENDA L. KELLER, APPELLANT, V.
THOMAS N. TAVARONE, M.D., APPELLEE.
655 N.W.2d 899

Filed January 31, 2003. No. S-01-1052.

1. **Demurrer: Pleadings: Judicial Notice: Records.** While a demurrer otherwise goes only to those defects in pleading which appear on the face of the petition and those documents attached to and made a part of it, in ruling on a demurrer, a court may take judicial notice of its own record in an interwoven and interdependent action it previously adjudicated.
2. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the decision made by the court below.

3. **Political Subdivisions Tort Claims Act.** The Political Subdivisions Tort Claims Act is the exclusive means by which a tort claim may be maintained against a political subdivision or its employees.
4. **Political Subdivisions Tort Claims Act: Jurisdiction.** While not a jurisdictional prerequisite, the filing or presentment of a claim to the appropriate political subdivision is a condition precedent to commencement of a suit under the Political Subdivisions Tort Claims Act.
5. **Political Subdivisions Tort Claims Act: Public Purpose.** The taxpaying public has an interest in seeing that prompt and thorough investigation of claims is made where a political subdivision is involved, and the taxpayers who provide the public treasury with funds have an interest in protecting that treasury from stale claims.
6. **Political Subdivisions Tort Claims Act: Municipal Corporations: Notice.** The primary purpose of notice provisions in connection with actions against political subdivisions is to afford municipal authorities prompt notice of the accident and injury in order that an investigation may be made while the occurrence is still fresh and the municipal authorities are in a position to intelligently consider the claim and to allow it if deemed just or, in the alternative, to adequately protect and defend the public interest.
7. **Statutes.** A court must place on a statute a reasonable construction which best achieves the statute's purpose, rather than a construction which would defeat the statute's purpose.
8. _____. Effect must be given, if possible, to all the several parts of a statute, and no sentence, clause, or word should be rejected as meaningless or superfluous if it can be avoided.
9. **Statutes: Legislature: Intent.** An appellate court will place a sensible construction upon a statute to effectuate the object of the legislation, as opposed to a literal meaning that would have the effect of defeating the legislative intent.

Appeal from the District Court for Cherry County: WILLIAM B. CASSEL, Judge. Affirmed.

Richard A. DeWitt and Robert S. Lannin, of Croker, Huck, Kasher, DeWitt, Anderson & Gonderinger, P.C., for appellant.

Robert W. Wagoner for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LEMAN, JJ.

PER CURIAM.

NATURE OF CASE

Appellant, Brenda L. Keller, filed a medical malpractice petition against appellee, Thomas N. Tavarone, M.D., under the Political Subdivisions Tort Claims Act (Tort Claims Act),

expressly relying on the “savings clause” of Neb. Rev. Stat. § 13-919(2) (Reissue 1997). The district court found the savings clause inapplicable and dismissed the action. We removed the appeal to our docket on our own motion pursuant to our authority to regulate the caseloads of this court and the Nebraska Court of Appeals. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995). As explained below, we affirm the September 4, 2001, order of the district court.

BACKGROUND

Keller originally sued Tavarone for alleged medical malpractice utilizing the provisions under the Nebraska Hospital-Medical Liability Act (NHMLA). See, Neb. Rev. Stat. ch. 44, art. 28 (Reissue 1993 & Cum. Supp. 1996); *Keller v. Tavarone*, 262 Neb. 2, 628 N.W.2d 222 (2001). This prior action shall hereinafter be referred to as the “first suit.”

In the first suit, Keller filed a petition in district court on December 31, 1998. The petition alleged Tavarone had performed an abdominal hysterectomy on Keller on May 27, 1997, at Cherry County Hospital and that complications had ensued, including a fistula and an obstructed ureter. The petition waived review of the claim by a medical review panel pursuant to the NHMLA. See Neb. Rev. Stat. § 44-2840(4) (Reissue 1998). The petition did not allege compliance with the Tort Claims Act. See Neb. Rev. Stat. § 13-920(1) (Reissue 1997).

The district court dismissed the first suit on January 12, 2000. The court determined that Tavarone was an employee of a county hospital which, as a governmental entity, is exclusively subject to the provisions of the Tort Claims Act. The court further found that Keller had not complied with the claim requirements of the Tort Claims Act. This court affirmed. *Keller v. Tavarone*, *supra*.

Shortly thereafter, Keller submitted a written claim to the political subdivision on January 27, 2000, pursuant to Neb. Rev. Stat. § 13-905 (Reissue 1997) of the Tort Claims Act. After waiting the required 6 months, Keller withdrew the tort claim and commenced this suit on August 14, 2000, pursuant to § 13-920(2). On November 27, 2000, Keller filed an amended petition. This second action will hereinafter be referred to as the “second suit.”

Keller’s cause of action in the second suit expressly relies on the “savings clause” of the Tort Claims Act. See § 13-919(2). In

district court, Keller argued that § 13-919(2) of the Tort Claims Act extended the filing period in which a claim must be made under § 13-920(1). Keller alleged that the savings clause extended the filing period for 6 months from the date the first suit was dismissed. She further alleged that the filing requirements were satisfied and that her claim was timely.

Tavarone filed a demurrer. Tavarone argued that Keller had not satisfied the condition precedent of § 13-920(1) requiring a claim to be submitted to the political subdivision within 1 year after such claim accrued. Therefore, Keller's cause of action was time barred.

Neither the district court nor this court considered the applicability of the savings clause in the first suit, finding the argument premature. However, in the second suit, the district court ruled (1) that the savings clause did not apply to political subdivision employee negligence cases filed under § 13-920 and (2) that even if § 13-919(2) applies to claims filed under § 13-920, its application would not save the second suit because the time to file Keller's claim had expired. The district court reasoned that the language "otherwise expire" found in the savings clause meant that the time to make a claim under the Tort Claims Act expires 1 year after such claim accrued, or in Keller's case, on May 27, 1998. Since the first suit was filed on December 31, 1998, the court concluded that Keller's petition in the second suit was time barred. For these two reasons, the district court dismissed Keller's cause of action in the second suit.

ASSIGNMENTS OF ERROR

Keller assigns that the district court erred (1) in concluding that the savings clause found in § 13-919(2) does not apply to political subdivision employee negligence cases and (2) in the court's interpretation that even if the savings clause is applicable to political subdivision employees, its application is improper because the time to make a claim under the Tort Claims Act had already expired.

STANDARD OF REVIEW

[1] While a demurrer otherwise goes only to those defects in pleading which appear on the face of the petition and those documents attached to and made a part of it, in ruling on a demurrer,

a court may take judicial notice of its own record in an interwoven and interdependent action it previously adjudicated. *Tilt-Up Concrete v. Star City/Federal*, 261 Neb. 64, 621 N.W.2d 502 (2001).

[2] Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the decision made by the court below. *Ways v. Shively*, 264 Neb. 250, 646 N.W.2d 621 (2002).

ANALYSIS

[3,4] The Tort Claims Act is the exclusive means by which a tort claim may be maintained against a political subdivision or its employees. *Keller v. Tavarone*, 262 Neb. 2, 628 N.W.2d 222 (2001). While not a jurisdictional prerequisite, the filing or presentment of a claim to the appropriate political subdivision is a condition precedent to commencement of a suit under the Tort Claims Act. *Id.* Section 13-920(1) provides, in relevant part, that

[n]o suit shall be commenced against any employee of a political subdivision for money on account of damage to or loss of property or personal injury to or the death of any person caused by any negligent or wrongful act or omission of the employee while acting in the scope of his or her office or employment . . . unless a claim has been submitted in writing to the governing body of the political subdivision within one year after such claim accrued

Keller's claim for medical malpractice accrued on May 27, 1997, but Keller did not file a claim with the political subdivision until January 27, 2000. It is, therefore, undisputed that Keller did not comply with the 1-year filing deadline set forth by § 13-920(1). We stated in the first suit, *Keller v. Tavarone*, 262 Neb. at 15, 628 N.W.2d at 232, that

the procedure the statutes required Keller to follow was, first, to file a claim with the appropriate officer of the political subdivision, pursuant to § 13-905, within 1 year of the accrual of her claim. After the claim was disposed of or withdrawn, pursuant to § 13-906, Keller would have been permitted to either submit a proposed petition to a review panel, or waive such review, pursuant to § 44-2840(3) and

(4). If she had presented the petition to a review panel, she would have had an extra 90 days, after the issuance of the opinion of the review panel, to file suit under the Tort Claims Act. See § 13-919(4). If she had waived the panel review, the action under the Tort Claims Act would have been filed directly in the district court. See, § 44-2840(4); § 13-907.

The operation of the NHMLA, however, did not excuse Keller from compliance with the requirement under the Tort Claims Act that the claim be presented to the political subdivision prior to filing suit. As Keller concedes that no claim was filed with the political subdivision prior to filing suit, her petition was properly dismissed pursuant to § 13-920(1).

Keller argues that the claim which provides the basis for the instant case was timely filed with the political subdivision pursuant to § 13-919(2), which provides, in relevant part, that

[i]f a claim is made or filed under any other law of this state and a determination is made by a political subdivision or court that the act provides the exclusive remedy for the claim, the time to make a claim and to begin suit under the act shall be extended for a period of six months from the date of the court order making such determination or the date of mailing of notice to the claimant of such determination by the political subdivision if the time to make the claim and to begin suit under the act would otherwise expire before the end of such period.

Keller argues that her first suit, pursuant to the NHMLA, was a claim “made . . . under any other law of this state” and that she had an additional 6 months from the dismissal of the first lawsuit to file a claim with the political subdivision. Even assuming that a medical malpractice lawsuit is a claim “made . . . under any other law of this state”—a matter we need not decide—the problem with Keller’s argument is that such an expansive reading of § 13-919(2) would result in the functional abrogation of §§ 13-919(1) and 13-920(1).

If Keller’s argument were correct, then any potential claimant who had allowed the 1-year filing deadline of the Tort Claims Act to pass could revive that claim by filing a lawsuit in district court. When that lawsuit was dismissed, the claimant could then

file a claim with a political subdivision. Clearly, Keller's broad reading of § 13-919(2) is inconsistent with the legislative purpose expressed by the 1-year filing deadlines of §§ 13-919(1) and 13-920(1).

[5,6] The taxpaying public has an interest in seeing that prompt and thorough investigation of claims is made where a political subdivision is involved, and the taxpayers who provide the public treasury with funds have an interest in protecting that treasury from stale claims. See *Campbell v. City of Lincoln*, 195 Neb. 703, 240 N.W.2d 339 (1976). The primary purpose of notice provisions in connection with actions against political subdivisions is to afford municipal authorities prompt notice of the accident and injury in order that an investigation may be made while the occurrence is still fresh and the municipal authorities are in a position to intelligently consider the claim and to allow it if deemed just or, in the alternative, to adequately protect and defend the public interest. *Id.*

[7,8] Keller's suggested interpretation of § 13-919(2) would frustrate the purpose of the notice provisions. However, a court must place on a statute a reasonable construction which best achieves the statute's purpose, rather than a construction which would defeat the statute's purpose. *A-1 Metro Movers v. Egr*, 264 Neb. 291, 647 N.W.2d 593 (2002). Keller's reading of § 13-919(2) would also open a loophole in the notice provisions of the Tort Claims Act that would effectively extend the filing deadline for a tort claim against a political subdivision until no timely claim could be brought under *any* other state law. This would, as a practical matter, render §§ 13-919(1) and 13-920(1) meaningless. However, effect must be given, if possible, to all the several parts of a statute, and no sentence, clause, or word should be rejected as meaningless or superfluous if it can be avoided. *Omaha Pub. Power Dist. v. Nebraska Dept. of Revenue*, 248 Neb. 518, 537 N.W.2d 312 (1995).

[9] We recognize that Keller's interpretation of § 13-919(2) is not necessarily inconsistent with the statutory language. It is, however, inconsistent with the statutory purpose reflected in the notice provisions of §§ 13-919(1) and 13-920(1). An appellate court will place a sensible construction upon a statute to effectuate the object of the legislation, as opposed to a literal

meaning that would have the effect of defeating the legislative intent. *A-1 Metro Movers v. Egr, supra*. The evident purpose of the 6-month extension of the filing deadline set forth in § 13-919(2) is to provide claimants who filed timely claims, but filed those claims with the wrong tribunal or pursuant to the wrong statute, enough time to present their claims to the proper political subdivision. This requires, however, that those claimants still act promptly in order to satisfy the public purpose reflected in the notice requirements.

We conclude, therefore, that a claim “made or filed under any other law of this state,” within the meaning of § 13-919(2), must still be filed within the 1-year time limit imposed by the appropriate notice provision of either § 13-919(1) or § 13-920(1). If a claimant files a claim within 1 year of the accrual of the claim, but files that claim with the wrong tribunal or pursuant to the wrong statute, then § 13-919(2) provides the claimant with an additional 6 months, from the determination that the Tort Claims Act provides the exclusive remedy, to file a claim with the appropriate political subdivision as provided in § 13-905.

In this case, it is not disputed that Keller’s first lawsuit under the NHMLA was not filed within 1 year of the accrual of the claim. Therefore, Keller did not comply with the notice provision of § 13-920(1), and her subsequent claim to the political subdivision was untimely. Consequently, the district court correctly dismissed Keller’s petition, and the judgment of the district court must be affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, v.
DANIEL G. JAMES, APPELLANT.
655 N.W.2d 891

Filed January 31, 2003. No. S-02-420.

1. **Convictions: Appeal and Error.** A trial court’s findings in a criminal case have the effect of a jury verdict, and a conviction in a bench trial will be sustained if the properly admitted trial evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.

2. **Trial: Lesser-Included Offenses: Appeal and Error.** In a bench trial, the defendant must timely object to the trial court's consideration of lesser-included offenses in order to preserve that issue for appellate review.
3. **Criminal Law: Lesser-Included Offenses: Directed Verdict.** Where the State fails to demonstrate a prima facie case on the crime charged but does so on a lesser-included offense, a trial court in its discretion may direct a verdict on the crime charged and submit the evidence to the trier of fact for consideration on the lesser-included offense.
4. **Lesser-Included Offenses: Jury Instructions: Notice.** A trial court is not required to sua sponte instruct on lesser-included offenses, but the trial court may do so if the evidence adduced at trial would warrant conviction of the lesser charge and the defendant has been afforded a fair notice of those lesser-included offenses.
5. **Criminal Law: Lesser-Included Offenses.** Where a crime is capable of being attempted, such crime is a lesser-included offense of the crime charged.
6. **Indictments and Informations: Lesser-Included Offenses: Notice.** The nature of the crime charged in the information must be such as to give the defendant notice that he or she could at the same time face a lesser-included offense charge.
7. **Criminal Law: Motions for New Trial: Appeal and Error.** In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed.

Patrick J. Boylan, of Hascall, Jungers & Garvey, for appellant.

Don Stenberg, Attorney General, and Martin W. Swanson for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, McCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

NATURE OF CASE

Daniel G. James appeals from his conviction for attempted first degree sexual assault on a child.

SCOPE OF REVIEW

[1] A trial court's findings in a criminal case have the effect of a jury verdict, and a conviction in a bench trial will be sustained if the properly admitted trial evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Abbink*, 260 Neb. 211, 616 N.W.2d 8 (2000).

FACTS

James was charged by information with first degree sexual assault on a child, in violation of Neb. Rev. Stat. § 28-319(1)(c) (Reissue 1995). The information charged that

[d]uring the period of July 15, 2001 through August 4, 2001 . . . in Sarpy County, Nebraska, said Daniel G. James, being a person of nineteen years of age or older, did then and there subject a person of less than sixteen years of age . . . to sexual penetration, in violation of Section 28-319 (1)(c), R.R.S. Nebraska. (Class II Felony)[.]

James waived his right to a jury trial, and following a bench trial, he was found guilty of attempted first degree sexual assault on a child, a Class III felony.

The victim testified that while she was talking with James on the telephone on July 16, 2001, he said he was going to come to her house. He arrived around midnight or 12:30 a.m., and they went outside to talk.

The victim stated that at the time of the first incident, she was sitting on a cement step located near the side of her house and that she was wearing boxer shorts and a shirt, with underwear and a bra underneath. As they were talking, James asked the victim if she would have sex with him, and she refused. The victim testified that James then tried to penetrate her and that she continued to say "no." The victim said James attempted to penetrate her for approximately 5 minutes. When he was unsuccessful, James became angry and left. After he left, the victim went inside and went to bed without telling anyone about the incident.

The victim testified that on July 23, 2001, James called and asked if he could come to her house, and she told him it was too late. Nevertheless, James appeared at the victim's home with one of her friends. About 10 minutes later, James took the friend home and returned around midnight or 12:30 a.m. James and the victim then went outside to the same location they had a week earlier. The victim said James again asked her to have sex. She said that when she refused, James tried to penetrate her. She said that he was partially successful, but she did not respond, so James became angry and left. The victim said she went inside and went to bed, again without telling anyone.

On August 2, 2001, James came to the victim's house around 10 or 10:30 p.m., and they went to her sister's bedroom after the victim introduced James to her mother. The victim and James sat on the bed and watched television. After about an hour, James asked the victim to have sex with him. The victim said that James tried to penetrate her and again was only partially successful. When she did not respond, James became angry and left.

On August 4, 2001, the victim's pastor learned of the incidents and called the police, who interviewed the victim.

At trial, the victim testified that she was born on February 23, 1986; that she was a freshman in high school; that she met James through her church during the summer of 2001; and that James told her he was 20 years old. The victim admitted she originally told the police that the first two incidents occurred on the lawn rather than on the cement step outside her home. She also admitted that she had previously accused someone else of sexual assault.

Det. Ivan Crespo of the Bellevue Police Department testified that he contacted James on August 22, 2001, in the course of investigating an alleged sexual assault. Crespo said James presented a Nebraska driver's license which indicated his date of birth as October 19, 1980.

After the State rested, James moved for a directed verdict, which motion was overruled. We note that the proper motion would have been a motion to dismiss, and we treat the motion accordingly. The trial court subsequently found James guilty of attempted first degree sexual assault on a child, which it determined was a lesser-included offense of the charge set forth in the information.

James moved for a new trial, alleging that the State had failed to prove his age, which is an element of the offense of first degree sexual assault on a child. In overruling the motion, the trial court concluded there was sufficient evidence to demonstrate that James was over the age of 19 at the time of the alleged offense, as required by § 28-319(1)(c). The victim testified that James had told her he was 20, and Crespo testified that James' driver's license indicated his date of birth was October 19, 1980.

The trial court also concluded that attempted first degree sexual assault on a child is a lesser-included offense of first degree

sexual assault on a child and that the lesser charge was properly submitted for the court's consideration even in the absence of a request by James. The court noted that certain testimony and circumstances precluded a finding beyond a reasonable doubt that penetration had occurred. However, the court found that the evidence was more than sufficient to find beyond a reasonable doubt that James intended to have sex with the victim and made at least one overt act, if not more, toward that end.

James was sentenced to 2 years of intensive supervised probation, and he timely appealed.

ASSIGNMENTS OF ERROR

James makes the following assignments of error: (1) The trial court erred in finding that attempted first degree sexual assault on a child is a lesser-included offense of first degree sexual assault on a child and (2) the court erred in overruling his motion for new trial.

ANALYSIS

James was charged by information with first degree sexual assault on a child, in violation of § 28-319(1), which prohibits "sexual penetration . . . (c) when the actor is nineteen years of age or older and the victim is less than sixteen years of age." He was convicted of attempted first degree sexual assault on a child. Neb. Rev. Stat. § 28-201(1) (Cum. Supp. 2002) provides that a person is guilty of an attempt to commit a crime if he or she:

(a) [i]ntentionally engages in conduct which would constitute the crime if the attendant circumstances were as he or she believes them to be; or

(b) [i]ntentionally engages in conduct which, under the circumstances as he or she believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his or her commission of the crime.

James asserts that the trial court erred in finding that attempted first degree sexual assault on a child is a lesser-included offense of first degree sexual assault on a child. He claims that attempted first degree sexual assault on a child is not a crime in Nebraska.

James relies upon *State v. George*, 264 Neb. 26, 645 N.W.2d 777 (2002), a case in which this court denied postconviction relief. On direct appeal, the Nebraska Court of Appeals reversed

a conviction for attempted manslaughter. The Court of Appeals stated: "A person cannot perform the same act intentionally and unintentionally at the same time." *State v. George*, 3 Neb. App. 354, 358, 527 N.W.2d 638, 642 (1995). James argues that a person cannot intentionally take a substantial step toward the commission of an unintentional crime and that, therefore, attempted first degree sexual assault on a child is not a crime. We disagree.

To obtain a conviction for first degree sexual assault on a child, the State must prove only that the defendant subjected the victim to sexual penetration at a time when the defendant was over the age of 19 and the victim was under the age of 16. Pursuant to § 28-201(1)(b), a person is guilty of criminal attempt if he "[i]ntentionally engages in conduct which . . . constitutes a substantial step in a course of conduct intended to culminate in his . . . commission of the crime."

As the trial court correctly noted, a person can intentionally attempt an act that does not require criminal intent to complete. The evidence clearly shows that James demonstrated an intent to attempt to commit the crime of first degree sexual assault on a child. The victim described three occasions during which James demonstrated an intent to sexually penetrate her, and he took substantial steps to accomplish penetration. The trial court did not err in finding James guilty of attempted first degree sexual assault on a child as a lesser-included offense.

James also assigns as error that the trial court abused its discretion by not sustaining his motion for new trial. He claims that he was convicted of a crime that does not exist in Nebraska. We find this argument to be without merit. In *State v. Shockley*, 231 Neb. 247, 435 N.W.2d 903 (1989), this court affirmed a criminal conviction for attempted first degree sexual assault on a child, which is a crime in Nebraska.

James also seems to argue that the trial court, which served as the finder of fact in this case, should not have found him guilty of the lesser-included offense of attempted first degree sexual assault on a child when James did not request such a finding. This argument has no merit, but we address it because it was considered by the court in ruling on the motion for new trial.

[2] Normally, the defendant must raise the issue of lesser-included offenses at trial. In a bench trial, the defendant must

timely object to the trial court's consideration of lesser-included offenses in order to preserve that issue for appellate review. *State v. Keup*, ante p. 96, 655 N.W.2d 25 (2003). However, the defendant does not need to raise the issue in order for the trial court to consider lesser-included offenses. If the evidence adduced at trial would warrant conviction of the lesser charge and the defendant has been afforded a fair notice of those lesser-included offenses, the trial court may consider the lesser-included offense.

In *State v. Foster*, 230 Neb. 607, 433 N.W.2d 167 (1988), the defendant was charged with one count of first degree assault. Following a bench trial, the court concluded that the evidence was insufficient to sustain the charge of first degree assault because reasonable minds could not conclude that there was a serious bodily injury, and it sustained the defendant's motion to dismiss the crime charged. However, the court found the defendant guilty of the lesser-included offense of attempted first degree assault.

[3] On appeal, the defendant claimed the trial court erred in considering and convicting him of attempted first degree assault as a lesser-included offense of first degree assault. This court held that where the State fails to demonstrate a prima facie case on the crime charged but does so on a lesser-included offense, the trial court in its discretion may direct a verdict on the crime charged and submit the evidence to the trier of fact for consideration on the lesser-included offense. *Id.*

[4] In *State v. Pribil*, 224 Neb. 28, 395 N.W.2d 543 (1986), the defendant was charged with first degree assault. At the close of the evidence, the court, on its own motion, instructed the jury on first degree, attempted first degree, and third degree assault. The defendant objected to the instructions insofar as they submitted the lesser-included offenses of attempted first degree assault and third degree assault to the jury. We considered whether it was proper for the trial court to instruct the jury on a lesser-included offense of attempted first degree assault and third degree assault when the defendant objected to those instructions. We held that a trial court is not required to sua sponte instruct on lesser-included offenses, but the trial court may do so if the evidence adduced at trial would warrant conviction of the lesser charge and the defendant has been afforded a fair notice of those lesser-included offenses. Either the State

or the defendant may request a lesser-included offense instruction where it is supported by the pleadings and the evidence. We held it was not error for a trial court to instruct the jury, over the defendant's objection, on any lesser-included offenses supported by the evidence and the pleadings.

In determining whether under a charge of a completed offense the accused may be convicted of attempting to commit the offense charged, some states have by statute made the attempt a lesser-included offense of the completed offense. See, *People v. Shreve*, 167 A.D.2d 698, 563 N.Y.S.2d 851 (1990) (attempted first degree rape was lesser-included offense of first degree rape and could be charged as such by trial court, even if attempted rape required intent not essential for completed crime of rape); *Moore v. State*, 969 S.W.2d 4 (Tex. Crim. App. 1998); *State v. Young*, 139 Vt. 535, 433 A.2d 254 (1981); *State v. Gallegos*, 65 Wash. App. 230, 828 P.2d 37 (1992). New Jersey has held that attempt is a lesser-included offense which need not be separately charged in the indictment. See, *State v. Mann*, 244 N.J. Super. 622, 583 A.2d 372 (1990); *State v. LeFurge*, 101 N.J. 404, 502 A.2d 35 (1986). In *Crawford v. State*, 107 Nev. 345, 811 P.2d 67 (1991), the Supreme Court of Nevada held that an attempted crime was not a lesser-included offense of a completed crime, since an element of the crime of attempt is the failure to accomplish the completed crime. However, the court stated that the state may charge the defendant with a completed crime and obtain a conviction for the attempted crime, since every consummated crime is necessarily preceded by an attempt to commit that crime. Nevada's statute provided that a defendant could be found guilty of an attempt to commit the offense charged. See *id.*

In other states, courts have held that attempt is a lesser-included offense even when no statute specifically provides as such. In *Com. v. Capone*, 39 Mass. App. 606, 659 N.E.2d 1196 (1996), the defendant was indicted for statutory rape and for indecent assault and battery. At the close of the commonwealth's case, the defendant moved for a directed verdict on the statutory rape indictment on the ground that there was insufficient proof of penetration. The court initially allowed the motion in its entirety, but on reflection ordered that the case be submitted to the jury on

assault with intent to commit statutory rape. The defendant was so convicted.

On appeal, the defendant argued that it was error to instruct the jury on assault with intent to commit statutory rape, because that crime was not a lesser-included offense of statutory rape, the offense for which the defendant was indicted. The court stated that a charge of a completed crime logically includes a charge of an attempt to commit it, citing *Commonwealth v. Gosselin*, 365 Mass. 116, 309 N.E.2d 884 (1974). See, also, *Com. v. Banner*, 13 Mass. App. 1065, 1066, 434 N.E.2d 1304, 1305 (1982) ("attempt to commit a crime is a lesser included offense within the completed offense").

In *State v. Lutheran*, 76 S.D. 561, 82 N.W.2d 507 (1957), the defendant was prosecuted on an information which charged him with incest, adultery, and rape of his 9-year-old daughter. The jury convicted him of attempt to commit each of the crimes charged. The defendant claimed error in instructing the jury that it could find him guilty of attempt to commit the particular crimes charged in the information. The court stated:

"It is a general rule that every completed crime necessarily includes an attempt to commit it, so that, under a charge of a completed offense, accused may be convicted of the lesser offense of attempting to commit the crime charged, as under statutes in terms providing for conviction of an attempt" 42 C.J.S., *Indictments and Informations*, § 285, p. 1305.

Lutheran, 76 S.D. at 562, 82 N.W.2d at 508.

South Dakota law permitted the jury to convict the defendant of the charge contained in the information or of an attempt to commit the offense charged. See *id.* The law also provided that "[e]very person who attempts to commit any crime and in such attempt does any act toward the commission of such crime . . ." is punishable as therein provided." (Emphasis omitted.) *Id.* at 562-63, 82 N.W.2d at 508. The court held that such statutes did not infringe upon the constitutional right of an accused to be informed of the nature and cause of the accusation against him. See, also, *State v. Cross*, 144 Kan. 368, 59 P.2d 35 (1936) (on statutory rape charge, accused may be convicted of attempt to commit such crime); *State v. Winslow*, 30 Utah 403, 85 P. 433

(1906) (person charged with incest may properly be convicted of attempt to commit that crime).

[5] We adopt the holding of *Com. v. Capone*, 39 Mass. App. 606, 659 N.E.2d 1196 (1996), in which the court stated that a charge of a completed crime logically includes a charge of an attempt to commit it. See, also, *Commonwealth v. Gosselin*, *supra*. This result is consistent with our decisions in *State v. Foster*, 230 Neb. 607, 433 N.W.2d 167 (1988), and *State v. Pribil*, 224 Neb. 28, 395 N.W.2d 543 (1986), in which we considered whether it was proper to instruct on the lesser-included offenses of attempted first degree assault and third degree assault when the defendant objected to the instructions (*Pribil*) and whether the court may instruct on lesser-included offenses when the State fails to make a prima facie case for the principal crime charged (*Foster*). The test for determining whether a crime is a lesser-included offense is whether the offense in question cannot be committed without committing the lesser offense. See *State v. Al-Zubaidy*, 263 Neb. 595, 641 N.W.2d 362 (2002). Where a crime is capable of being attempted, we hold that an attempt to commit such a crime is a lesser-included offense of the crime charged. It is not necessary to charge a criminal defendant with the lesser-included offense of which the defendant may be found guilty because by charging the greater offense, the defendant is by implication charged with the lesser offense. Every completed crime necessarily includes an attempt to commit it. See *State v. Lutheran*, 76 S.D. 561, 82 N.W.2d 507 (1957).

In the case at bar, the State sought to prove that James, who was over the age of 19 years, subjected the victim, who was under the age of 16 years, to sexual penetration. The trial court found that the act of penetration was not proved beyond a reasonable doubt. Therefore, James was not convicted of the crime charged. However, the court found that James had intentionally engaged in conduct which, under the circumstances as he believed them to be, constituted a substantial step in a course of conduct intended to culminate in first degree sexual assault.

[6] The nature of the crime charged in the information must be such as to give the defendant notice that he or she could at the same time face a lesser-included offense charge. The nature of the crime charged was sufficient to give James notice that he

could be convicted of the crime of attempted first degree sexual assault on a child.

In this case, the trial court found that James had attempted to sexually penetrate a person who was less than 16 years of age and that James was over 19 years of age. We conclude that the court did not err in considering the evidence which would support a conviction of the lesser-included offense of attempted first degree sexual assault on a child and in finding James guilty of the lesser-included offense.

[7] In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed. *State v. Jackson*, 264 Neb. 420, 648 N.W.2d 282 (2002). We find no abuse of discretion in the trial court's refusal to grant a new trial.

CONCLUSION

The judgment of the trial court was correct and is therefore affirmed.

AFFIRMED.

IN RE INTEREST OF J.K., A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. DOUGLAS R. SWITZER AND
JESSICA A. KERKHOFS, GUARDIANS AD LITEM, APPELLANTS,
AND WILLIAM K. AND CONSTANCE K., ADOPTIVE PARENTS
OF CHILD, AND NEBRASKA DEPARTMENT OF HEALTH
AND HUMAN SERVICES, APPELLEES.

656 N.W.2d 253

Filed January 31, 2003. No. S-02-438.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, on which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **Minors: Parental Rights.** The dual purpose of proceedings under Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2002) is to protect the welfare of the minor and to safeguard the parents' right to properly raise their child.
3. **Minors: Guardians Ad Litem: Attorneys at Law.** When an attorney is appointed under Neb. Rev. Stat. § 43-272(2) and (3) (Cum. Supp. 2002) for the juvenile in proceedings under Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2002), the attorney serves as both guardian ad litem and as counsel for the child.

4. **Juvenile Courts: Guardians Ad Litem.** A guardian ad litem determines the best interests of the juvenile and reports that determination to the court.
5. ____: _____. In proceedings under Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2002), a guardian ad litem not only determines and reports to the court what is in the juvenile's best legal and social interests, but also advocates that position. Neb. Rev. Stat. § 43-272.01 (Reissue 1998).
6. **Juvenile Courts: Attorneys at Law: Rules of the Supreme Court.** In proceedings under Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2002), counsel for the juvenile is required to zealously advocate the wishes of the juvenile, as long as those wishes are within the bounds of the law. Canon 7, EC 7-1, of the Code of Professional Responsibility.
7. **Juvenile Courts: Guardians Ad Litem: Attorneys at Law.** The Nebraska Juvenile Code recognizes that generally, the role of guardian ad litem and counsel can be carried out by the same attorney. But the code requires that the roles be split when there are "special reasons in a particular case." Neb. Rev. Stat. § 43-272(3) (Cum. Supp. 2002).
8. **Statutes: Appeal and Error.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
9. **Juvenile Courts: Constitutional Law: Words and Phrases.** The phrase "special reasons in a particular case" as used in Neb. Rev. Stat. § 43-272(3) (Cum. Supp. 2002) grants juvenile courts broad power to safeguard the interests of the juvenile and to ensure that the juvenile's statutory and constitutional rights are respected.
10. **Juvenile Courts: Minors: Right to Counsel.** The determination whether "special reasons" exist for appointing a juvenile separate counsel in proceedings under Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2002) must be based on a case-by-case basis, taking into consideration the totality of circumstances. Neb. Rev. Stat. § 43-272(3) (Cum. Supp. 2002).
11. **Juvenile Courts: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings.
12. **Juvenile Courts: Guardians Ad Litem: Attorneys at Law: Legislature: Appeal and Error.** Given the broad power granted by the Legislature to juvenile courts to determine whether in proceedings under Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2002) the guardian ad litem role and the role of counsel for the juvenile should be split, an appellate court reviews the decision to use or not to use that power de novo on the record for an abuse of discretion. Neb. Rev. Stat. § 43-272(3) (Cum. Supp. 2002).
13. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result.
14. **Minors: Guardians Ad Litem: Attorneys at Law: Conflict of Interest.** A conflict of interest can develop between the roles of counsel for the juvenile and guardian ad litem if the juvenile expresses interests that are adverse to what the attorney considers to be in the juvenile's best interests. Usually, when an actual

conflict of interest develops between the two roles, separate counsel should be appointed for the child. Neb. Rev. Stat. § 43-272(3) (Cum. Supp. 2002).

15. **Minors: Due Process.** The due process requirements announced in *In re Gault*, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967), apply to proceedings to determine delinquency which may result in commitment to an institution.
16. ____: _____. *Parham v. J. R.*, 442 U.S. 584, 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1979), provides the requisite due process requirements for children in proceedings under Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2002).
17. **Minors: Guardians Ad Litem: Attorneys at Law.** *Parham v. J. R.*, 442 U.S. 584, 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1979), does not require splitting the roles of guardian ad litem and counsel for the juvenile. Neb. Rev. Stat. § 43-272(3) (Cum. Supp. 2002).

Appeal from the Separate Juvenile Court of Douglas County:
ELIZABETH G. CRNKOVICH, Judge. Affirmed.

Douglas R. Switzer and Jessica A. Kerkhofs, of Nebraska
Legal Services, guardians ad litem for J.K., pro se.

Marian G. Heaney, of Nebraska Legal Services, for appellants.

James S. Jansen, Douglas County Attorney, and James M.
Masteller for appellee State of Nebraska.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN,
McCORMACK, and MILLER-LEMAN, JJ.

CONNOLLY, J.

The separate juvenile court of Douglas County adjudicated J.K. under Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2002). J.K.'s guardians ad litem argue that J.K. was entitled to separate counsel under Neb. Rev. Stat. § 43-272(3) (Cum. Supp. 2002). This section provides in part, "A guardian ad litem shall act as his or her own counsel and as counsel for the juvenile, unless there are special reasons in a particular case why the guardian ad litem or the juvenile or both should have separate counsel." We conclude that the juvenile court did not abuse its discretion in refusing to appoint separate counsel. We affirm.

I. FACTUAL BACKGROUND

In March 2002, the Douglas County Attorney filed a petition in the separate juvenile court of Douglas County, asking the court to find that J.K. was a child within the meaning of § 43-247(3)(a)

because he was without support through no fault of his parents. In the petition, the State alleged that J.K. exhibits suicidal and homicidal tendencies and that the treating psychiatrist determined that J.K. should be placed in a residential treatment center for psychiatric care.

One of J.K.'s guardians ad litem moved to have the court appoint separate legal counsel for J.K. The guardian ad litem argued that special reasons existed under § 43-272(3) requiring the appointment of separate counsel for J.K.

The court refused to appoint separate counsel. The court noted that the proceedings were brought pursuant to § 43-247(3)(a), under which the parents are charged with being unable to meet the juvenile's needs, rather than § 43-247(3)(b) or (c). The court determined that the only issue was whether J.K.'s parents could provide for his care. It held the guardian ad litem could adequately "defend any issues concerning his placement and the appropriateness of his placement and/or any care that he might require in his best interests and to promote his health and safety."

In April 2002, J.K.'s parents entered pleas of admission to the petition and the county attorney gave a factual basis for the charges. The county attorney described J.K.'s mental health history, including times when he had demonstrated suicidal or homicidal tendencies. The court also received into evidence the affidavit of J.K.'s treating psychiatrist. He recommended that J.K. be placed "in [a residential treatment center] to meet his needs, which would include a locked, structured environment, school program . . . chemical dependency treatment, and psychiatric care." The county attorney stated that the parents had tried to address the juvenile's needs at home and by treatment, but had failed. He stated they needed the court's assistance in placing J.K. into a residential, long-term treatment facility. Over one of the guardian ad litem's objection, the court accepted the plea and found the factual basis sufficient to adjudicate J.K. The guardians ad litem appealed.

II. ASSIGNMENT OF ERROR

The guardians ad litem assign that the juvenile court erred in finding that special reasons did not exist in the present case requiring separate legal counsel for the juvenile.

III. STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law, on which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Newman v. Thomas*, 264 Neb. 801, 652 N.W.2d 565 (2002).

IV. ANALYSIS

1. STATUTORY BACKGROUND

[2] The State proceeded under § 43-247(3)(a), which, in part, provides that the juvenile court shall have jurisdiction of any juvenile “who is homeless or destitute, or without proper support through no fault of his or her parent, guardian, or custodian.” The dual purpose of proceedings under § 43-247(3)(a) is to protect the welfare of the minor and to safeguard the parents’ right to properly raise their child. *In re Interest of Constance G.*, 247 Neb. 629, 529 N.W.2d 534 (1995).

This case requires us to consider how the interests of the juvenile are represented in § 43-247(3)(a) proceedings. The question is governed by § 43-272(2) and (3). Section 43-272(2)(e) requires that the court appoint a guardian ad litem for the juvenile “in any proceeding pursuant to the provisions of [§ 43-247(3)(a)].” Section 43-272(3) requires that the person appointed be an attorney. It also provides that “a guardian ad litem shall act as his or her own counsel and as counsel for the juvenile, unless there are special reasons in a particular case why the guardian ad litem or the juvenile or both should have separate counsel.”

[3-6] The plain language of § 43-272(2) and (3) envisions a dual role for an attorney appointed under these subsections. First, the attorney serves as guardian ad litem. Generally, a guardian ad litem determines the best interests of the juvenile and reports that determination to the court. *Betz v. Betz*, 254 Neb. 341, 575 N.W.2d 406 (1998). Under the Nebraska Juvenile Code, the guardian ad litem is given somewhat broader powers; he or she not only determines and reports to the court what is in the juvenile’s best legal and social interests, but also advocates that position. Neb. Rev. Stat. § 43-272.01 (Reissue 1998); *In re Interest of Rachael M. & Sherry M.*, 258 Neb. 250, 603 N.W.2d 10 (1999). Second, an attorney appointed under § 43-272(2) and

(3) serves as counsel for the juvenile. As counsel, an attorney is required to zealously advocate the wishes of the juvenile (as opposed to the best interests of the juvenile), as long as those wishes are within the bounds of the law. *Orr v. Knowles*, 215 Neb. 49, 337 N.W.2d 699 (1983); Canon 7, EC 7-1, of the Code of Professional Responsibility.

[7] The juvenile code recognizes that generally, the roles of guardian ad litem and counsel can be carried out by the same attorney. But the code requires that the roles be split when there are “special reasons in a particular case.” § 43-272(3). The guardians ad litem argue that special reasons are present and thus that the court should have appointed separate counsel for J.K.

2. INTERPRETATION OF “SPECIAL REASONS IN A PARTICULAR CASE”

[8] In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Newman v. Thomas*, 264 Neb. 801, 652 N.W.2d 565 (2002).

[9,10] Although “special reasons in a particular case” is broad, it is not vague or ambiguous. It grants juvenile courts broad power to safeguard the interests of the juvenile and to ensure that the juvenile’s statutory and constitutional rights are respected. See Neb. Rev. Stat. § 43-246 (Reissue 1998) (setting out guidelines for construing the juvenile code). Thus, the determination whether “special reasons” exist must be based on a case-by-case basis, taking into consideration the totality of circumstances. We do note that in determining whether special reasons are present in a case, the juvenile courts should be particularly wary of the ethical implications that result from combining the roles of guardian ad litem and counsel for the juvenile in one person. See, Rebecca H. Hartz, *Guardians Ad Litem in Child Abuse and Neglect Proceedings: Clarifying the Roles to Improve Effectiveness*, 27 Fam. L.Q. 327 (1993).

3. STANDARD OF REVIEW FOR DETERMINING IF SPECIAL REASONS ARE PRESENT

[11,12] Before we turn to the question whether special reasons exist requiring the appointment of separate counsel, we must

determine the appropriate standard of review. Generally, juvenile cases are reviewed de novo on the record, and the appellate court is required to reach a conclusion independent of the trial court's findings. *In re Interest of Anthony R. et al.*, 264 Neb. 699, 651 N.W.2d 231 (2002). We have, however, employed an abuse of discretion standard in situations when the Legislature has granted the juvenile courts broad discretion to act or not to act. See, e.g., *In re Interest of Brandy M. et al.*, 250 Neb. 510, 550 N.W.2d 17 (1996) (holding prompt adjudication determinations are reviewed de novo to determine if there has been abuse of discretion); *In re Interest of D.D.P.*, 235 Neb. 864, 458 N.W.2d 193 (1990) (holding whether juvenile should be present during § 43-247(3)(a) proceedings rests in discretion of court). The Legislature has granted broad power to the juvenile courts to determine whether the guardian ad litem role and the role of counsel for the juvenile should be split. Accordingly, we review the decision whether to use that power de novo on the record for an abuse of discretion.

4. DO SPECIAL REASONS EXIST?

The guardians ad litem argue that three grounds exist for concluding that special reasons exist: (1) a conflict between their roles as guardians ad litem and counsel for J.K.; (2) procedural due process required the appointment of separate counsel; and (3) the legal and social interests of J.K., as determined by the guardians ad litem, conflicted.

[13] A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Gallner v. Hoffman*, 264 Neb. 995, 653 N.W.2d 838 (2002). On the record before us, the juvenile court did not abuse its discretion in refusing to find that special reasons existed requiring the appointment of separate counsel.

(a) Conflict of Interest

[14] A conflict of interest can develop between the roles of counsel for the juvenile and guardian ad litem if the juvenile expresses interests that are adverse to what the attorney considers

to be in the juvenile's best interests. See, *In re C.D.*, 27 S.W.3d 826 (Mo. App. 2000); *In re Shaffer*, 213 Mich. App. 429, 540 N.W.2d 706 (1995); *In re Interest of G.Y.*, 486 N.W.2d 288 (Iowa 1992); *In re Baby Girl Baxter*, 17 Ohio St. 3d 229, 479 N.E.2d 257 (1985); Hartz, *supra*; ABA Standards of Practice for Lawyers Representing a Child in Abuse and Neglect Cases A-2 cmt. (1996), at www.abanet.org/child/childrep.html. As counsel for the juvenile, the attorney is bound to advocate the juvenile's expressed interests; but, as guardian ad litem, the attorney is bound to present what he or she believes to be in the child's best interests. Usually, when an *actual conflict of interest* develops between the two roles, separate counsel should be appointed for the child.

The guardians ad litem argue that a conflict of interest existed between their role as guardians ad litem and their role as counsel for J.K. They claim that the court should have appointed separate counsel for J.K. The State sought to confine J.K. in a residential treatment facility. On appeal, the guardians ad litem state that they believe this confinement to be in the best interests of the juvenile. Nothing in the record suggests that J.K. ever expressed contrary wishes, and the guardians ad litem did not inform the court that a conflict existed. Rather, the guardians ad litem suggest that we should presume that J.K. had contrary wishes because the State sought to limit his liberty. A review of the record, however, shows that J.K.'s psychological problems led to a troubled homelife and that his parents sought intervention from the State. Under these circumstances, the court was under no obligation to presume that J.K. opposed being taken away from his parents and placed into a residential treatment facility. The juvenile court did not abuse its discretion in refusing to find an actual conflict between the roles of guardians ad litem and counsel for the juvenile. Accord *In re C.D.*, *supra*.

(b) Due Process

[15] The guardians ad litem next argue that "special reasons" existed because procedural due process required that J.K. be appointed separate counsel. This argument is without merit. The guardians ad litem rely on *In re Gault*, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967). *In re Gault*, however, applies to

“proceedings to determine *delinquency* which may result in commitment to an institution.” (Emphasis supplied.) 387 U.S. at 41. While this case involves a juvenile’s being committed to a locked, residential treatment center, it does not involve delinquency. Rather, it was brought under § 43-247(3)(a), and the question is whether J.K.’s parents could provide him with the psychological care he needed. See *In re Interest of D.D.P.*, 235 Neb. 864, 458 N.W.2d 193 (1990).

[16,17] “This is not to say that children are without legal rights which must be protected in proceedings under § 43-247(3)(a).” *In re Interest of D.D.P.*, 235 Neb. at 868, 458 N.W.2d at 197. We have recognized that *Parham v. J. R.*, 442 U.S. 584, 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1979), establishes due process requirements when parents civilly commit a child. Thus, *Parham* provides the requisite due process requirements instead of *In re Gault*. See *In re Interest of D.D.P.*, *supra*. *Parham* does not require a right to counsel, let alone splitting the roles of guardian ad litem and counsel for the juvenile.

(c) Conflict Between J.K.’s Legal and Social Interests

Section 43-272.01(2) provides a nonexhaustive list of criteria that the guardian ad litem is to consider in discharging his or her duties. Section 43-272.01(2)(b) requires the guardian ad litem to defend the juvenile’s legal and social interests. The guardians ad litem argue that a conflict existed between what they considered to be J.K.’s legal interests and what they considered to be J.K.’s social interests. The guardians ad litem claim that they could not adequately defend either interest and that separate counsel should have been appointed to defend J.K.’s legal interests.

As we understand it, this argument is different from the guardians ad litem’s claim that a conflict of interest existed because J.K. had expressed interests different from what the guardians ad litem thought were in J.K.’s best interests. Rather, we understand their argument to be that a conflict existed because *they had concluded* that treatment was in J.K.’s best social interests but that challenging the constitutionality of the proceedings was in J.K.’s best legal interests.

Although situations might exist when the juvenile’s legal interests are so divergent with the juvenile’s social interests that

one person cannot adequately represent both, this case does not present that problem. The juvenile court did not abuse its discretion. If the guardians ad litem believed that J.K. should have been committed for treatment, this would not have prevented J.K. from arguing that the State and the court were not following the requisite statutory and constitutional procedures. In fact, the record shows that the guardians ad litem did just that.

V. CONCLUSION

The juvenile court did not abuse its discretion in refusing to appoint separate counsel for J.K. Accordingly, we affirm.

AFFIRMED.

CITY OF ALLIANCE, NEBRASKA, A MUNICIPAL CORPORATION,
APPELLANT, v. BOX BUTTE COUNTY BOARD
OF EQUALIZATION, APPELLEE.
656 N.W.2d 439

Filed January 31, 2003. No. S-02-495.

1. **Taxation: Appeal and Error.** Questions of law arising during appellate review of Tax Equalization and Review Commission decisions are reviewed de novo on the record.
2. **Taxation: Statutes: Appeal and Error.** The meaning of a statute is a question of law, and a reviewing court is obligated to reach its conclusions independent of the determination made by the Tax Equalization and Review Commission.
3. **Administrative Law.** In the absence of anything to the contrary, language contained in a rule or regulation is to be given its plain and ordinary meaning.
4. **Statutes: Taxation: Proof.** Since a statute conferring an exemption from taxation is strictly construed, one claiming an exemption from taxation of the claimant or the claimant's property must establish entitlement to that exemption.

Appeal from the Nebraska Tax Equalization and Review Commission. Reversed and remanded with directions.

Leo Dobrovolny for appellant.

Karen A. Ditsch, Box Butte County Attorney, for appellee.

William G. Blake, of Pierson, Fitchett, Hunzeker, Blake & Katt, for amicus curiae League of Nebraska Municipalities.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, McCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

The Box Butte County Board of Equalization (Board) denied tax-exempt status for 67 properties owned by the City of Alliance, based upon the Board's determination that the subject properties were not being used for a public purpose. The Tax Equalization and Review Commission (TERC) affirmed the Board's decisions. The city appeals.

FACTS

The pertinent facts are not disputed. Alliance is a city of the first class having those powers enumerated in Neb. Rev. Stat. § 16-101 et seq. (Reissue 1997 & Cum. Supp. 2002). Such powers include the creation by ordinance of improvement districts for the purpose of building and financing streets, sewers, and water mains within and adjoining the corporate limits of the city. §§ 16-617 and 16-667. Alliance created several improvement districts in connection with the anticipated development of five residential subdivisions within the city.

The city issued bonds to pay the cost of the improvements, as provided by §§ 16-623 and 16-670. As required by §§ 16-622 and 16-669, the city by ordinance levied special assessments against various residential lots which were specially benefited by the improvements, including the lots which are the subject of this action. When collected, special assessments constitute a sinking fund for payment of the bonds issued with respect to the improvements. §§ 16-623 and 16-670.

Because property owners did not pay the special assessments, the city made expenditures from its general fund to service the bonded indebtedness. As a result of the special assessment defaults, the city acquired title to various properties by foreclosure or conveyance in lieu of foreclosure. The city offered these properties for sale to the public at prices which did not exceed the amount of delinquent special assessments and interest for each property. The city has not leased or rented any of the properties and does not realize any revenue from them. When a property is sold, the proceeds are used to reimburse the

city's general fund for debt service expenditures pursuant to § 16-648. The city sold 14 of the properties in 1998, 1 in 1999, and 7 in 2000. The remaining 67 properties are the subject of this appeal.

On March 1, 2001, the Board determined that the subject properties were taxable because they were not being used for a public purpose or being developed for a public use. Thereafter, the city filed protests on each of the subject properties, which the Board denied. The city filed appeals with TERC. The city and the Board stipulated that the only issue before TERC was whether the properties were being utilized for a public purpose. On April 9, 2002, TERC entered an order in which it affirmed the Board's decisions. The city filed this timely appeal.

ASSIGNMENT OF ERROR

The city assigns, restated and consolidated, that TERC erred in finding that the subject properties were not being used for a public purpose and were therefore subject to taxation.

STANDARD OF REVIEW

[1] Questions of law arising during appellate review of TERC decisions are reviewed de novo on the record. *Lyman-Richey Corp. v. Cass Cty. Bd. of Equal.*, 258 Neb. 1003, 607 N.W.2d 806 (2000).

ANALYSIS

The sole issue before us is one of first impression in Nebraska: When real property is acquired by a city through enforcement of special assessment liens and is offered for sale to the public at a price which does not exceed the delinquent special assessments and accrued interest, is the real property being used "for a public purpose" and therefore exempt from real estate taxation?

[2-4] Certain propositions of law govern our determination of the issue before us. The meaning of a statute is a question of law, and a reviewing court is obligated to reach its conclusions independent of the determination made by TERC. *Falotico v. Grant Cty. Bd. of Equal.*, 262 Neb. 292, 631 N.W.2d 492 (2001). In the absence of anything to the contrary, language contained in a rule or regulation is to be given its plain and ordinary meaning. *Vinci v. Nebraska Dept. of Corr. Servs.*, 253 Neb. 423, 571 N.W.2d 53

(1997). Since a statute conferring an exemption from taxation is strictly construed, one claiming an exemption from taxation of the claimant or the claimant's property must establish entitlement to that exemption. *First Data Corp. v. State*, 263 Neb. 344, 639 N.W.2d 898 (2002).

The Constitution of Nebraska provides that property of the state and its governmental subdivisions "shall be exempt from taxation to the extent such property is used by the state or governmental subdivision for public purposes authorized to the state or governmental subdivision by this Constitution or the Legislature." Neb. Const. art. VIII, § 2. The Legislature has further clarified the public purpose exemption in Neb. Rev. Stat. § 77-202(1)(a) (Cum. Supp. 2002), which states:

(1) The following property shall be exempt from property taxes:

(a) Property of the state and its governmental subdivisions to the extent used or being developed for use by the state or governmental subdivision for a public purpose. For purposes of this subdivision, public purpose means use of the property (i) *to provide public services* with or without cost to the recipient, including the general operation of government, public education, public safety, transportation, public works, civil and criminal justice, public health and welfare, developments by a public housing authority, parks, culture, recreation, community development, and cemetery purposes, or (ii) *to carry out the duties and responsibilities conferred by law* with or without consideration. Public purpose does not include leasing of property to a private party unless the lease of the property is at fair market value for a public purpose. Leases of property by a public housing authority to low-income individuals as a place of residence are for the authority's public purpose.

(Emphasis supplied.) The Department of Property Assessment and Taxation has also addressed the issue of exemptions and has adopted a regulation defining public purpose as

the use of property *to provide public services* with or without cost to the recipient, including the general operation of government, public education, public safety, transportation, public works, civil and criminal justice, public health and

welfare, developments by a public housing agency, parks, culture, recreation, community development, and cemetery purposes. Public purpose includes any use of the property *to carry out duties or responsibilities conferred by law*.

Public purpose does not include the leasing of property to a private party for purposes other than a public purpose.

(Emphasis supplied.) 350 Neb. Admin. Code, ch. 15, § 002.01 (2002). Based on the preceding authorities, it is clear that in order to qualify for the public purpose exemption, the subject properties must either be used to carry out the city's "duties or responsibilities conferred by law," or to provide "public services."

As noted above, the city has statutory authority to establish improvement districts in order to build certain public improvements and a statutory obligation to levy special assessments on the properties benefited by such improvements as a means of creating a sinking fund for payment of bonds issued to finance the improvements. See §§ 16-617 to 16-619, 16-622, 16-623, 16-667, 16-669, and 16-670. When levied, the special assessments become a lien upon the properties assessed. See §§ 16-646 and 16-672.08. Such special assessment liens are inferior only to general taxes levied by the state and its political subdivisions. Neb. Rev. Stat. § 77-1917.01 (Reissue 1996). The Board contends that the city is not carrying out its "duties and responsibilities" when it forecloses on special assessment liens because no statute "require[s]" it to do so. Brief for appellee at 4.

If a landowner becomes delinquent on special assessments, a city has the power to foreclose. Neb. Rev. Stat. § 18-1216(1) (Reissue 1997) provides:

(1) Any city of the metropolitan, primary, first, or second class or any village shall have authority to collect the special assessments which it levies and to perform all other necessary functions related thereto including foreclosure. The governing body of any city or village collecting its own special assessments shall direct that notice that special assessments are due shall be mailed or otherwise delivered to the last-known address of the person against whom such special assessments are assessed or to the lending institution or other party responsible for paying such special assessments. Failure to receive such notice shall not relieve

the taxpayer from any liability to pay such special assessments and any interest or penalties accrued thereon.

Section § 77-1917.01 further clarifies the effect of delinquent special assessments and provides in relevant part:

All cities . . . in Nebraska *shall* have a lien upon real estate within their boundaries for all special assessments due thereon to the municipal corporation or district, which lien shall be inferior only to general taxes levied by the state and its political subdivisions. When such special assessments have become delinquent . . . the municipal corporation or district involved *may* itself as party plaintiff proceed in the district court of the county in which the real estate is situated to foreclose, in its own name, the lien for such delinquent special assessments in the same manner and with like effect as in the foreclosure of a real estate mortgage

(Emphasis supplied.) It is true that § 77-1917.01 does not mandate that a city use the authority it has been granted by § 18-1216 to foreclose on properties with delinquent special assessments. However, in the absence of voluntary payment, foreclosure and resale of the property is the sole means by which a city may protect its lien and ultimately recover some or all of the special assessments it is due.

The record reflects that the city has acquired and offers the subject properties for sale for the sole purpose of realizing the value of the city's special assessment liens so as to reimburse its general fund for payments on its bonded indebtedness. As such, the city is prudently exercising its legal authority to defray the cost of public improvements from a revenue source legally designated for that purpose. Based on the undisputed facts, we conclude that the city acquired and is holding the subject properties for resale in conjunction with its municipal duties and responsibilities. The plain language of § 77-202(1)(a)(ii) provides that property which is used "to carry out the duties and responsibilities conferred by law" is held for a public purpose and is not subject to taxation.

Our decision is based on undisputed facts presented by the record and the plain language of our constitution and statutes. Cases from other jurisdictions also lend support to our conclusion

that property acquired in the enforcement of tax liens and held solely for purposes of recovering those taxes is held for a public purpose. For example, in *Pulaski v. Carriage Creek Property*, 319 Ark. 12, 888 S.W.2d 652 (1994), a governmental improvement district acquired property as the result of foreclosure for failure to pay improvement assessments. The district requested that the county assessor remove the property from the tax rolls until it could be sold. The county assessor refused, claiming that the property was not being used exclusively for a public purpose as required for the exemption. The Arkansas Supreme Court, in deciding whether the property was held for a public purpose, relied on an early Arkansas case in which it had stated:

“There is a material difference between the use of property exclusively for public purposes and renting it out and then applying the proceeds arising therefrom to the public use. The property under our Constitution must be actually occupied or made use of for a public purpose and our court has recognized the difference between the actual use of the property and the use of the income.”

... “The levee district only held the lands that it acquired at levee tax sale until it was practical to dispose of them again. They were not held for any purpose of gain or as income producing property. When sold, the proceeds took the place of the levee taxes, for the enforcement of which and the expenses incident thereto, they were sold, and in this way we think the lands were directly and immediately used exclusively for public purposes within the meaning of the Constitution, and were not subject to taxation.”

Id. at 15, 888 S.W.2d at 654, quoting *Robinson v. Indiana & Ark. Lbr. & Mfg. Co.*, 128 Ark. 550, 194 S.W. 870 (1917). In finding the property exempt from taxation, the court reasoned that the district in *Pulaski*, like the levee district in *Robinson*, was simply holding the property “‘in its governmental capacity pending sale of the [property] to recover delinquent taxes and penalties.’” *Pulaski*, 319 Ark. at 15, 888 S.W.2d at 654.

Other courts have reached similar conclusions under analogous factual circumstances. See, e.g., *State of Texas v. City of San Antonio*, 147 Tex. 1, 209 S.W.2d 756 (1948) (where city owns and holds property solely for purpose of collecting taxes

thereon until it can be resold, city owns and holds property for public purpose); *City of Austin v. Sheppard, Comptroller*, 144 Tex. 291, 190 S.W.2d 486 (1945) (property acquired by city under tax foreclosure proceedings is used solely for public purpose when it is not rented and city's sole intention is to sell property and obtain tax money). See, also, 71 Am. Jur. 2d *State and Local Taxation* § 277 (2001). As in these cases, the City of Alliance holds the subject property in a governmental capacity for the sole purpose of realizing the revenue attributable to its special assessment liens.

In support of its position that the properties are not exempt, the Board relies upon *Sun 'N Lake of Sebring Dist. v. McIntyre*, 800 So. 2d 715 (Fla. App. 2001). We find that case to be distinguishable in that the taxing entity entered into an agreement with private entities, including developers and bondholders, to jointly market property which was subject to delinquent assessments in a manner which would confer benefits upon the private enterprises. Here, the City of Alliance has acted independently in its governmental capacity to acquire and resell the property for the sole purpose of protecting its liens and realizing the proceeds of lawful assessments.

CONCLUSION

Based on the foregoing analysis, we conclude that the subject properties are used by the city exclusively for a public purpose and are therefore exempt from taxation pursuant to § 77-202(1)(a). We therefore reverse the TERC order and remand the cause to TERC with directions to instruct the Board to grant the requested exemptions on each of the subject properties.

REVERSED AND REMANDED WITH DIRECTIONS.

GALAXY TELECOM, L.L.C., APPELLANT, V.
J.P. THEISEN & SONS, INC., A NEBRASKA
CORPORATION, APPELLEE.
656 N.W.2d 444

Filed February 7, 2003. No. S-01-1306.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
2. **Statutes.** A court must place on a statute a reasonable construction which best achieves the statute's purpose, rather than a construction which would defeat the statute's purpose.

Appeal from the District Court for Otoe County: RANDALL L. REHMEIER, Judge. Reversed and remanded for further proceedings.

Gary J. Nedved and Joel D. Nelson, of Keating, O'Gara, Davis & Nedved, P.C., L.L.O., for appellant.

Larry E. Welch, Jr., of Welch Law Firm, P.C., for appellee.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

Galaxy Telecom, L.L.C. (Galaxy), appeals from an order of the district court for Otoe County dismissing its action for damages against J.P. Theisen & Sons, Inc. (Theisen). Galaxy sought recovery for damage caused by Theisen to an underground fiber-optic cable, based upon alternate theories of strict liability under the Nebraska One-Call Notification System Act (Act), Neb. Rev. Stat. §§ 76-2301 to 76-2330 (Reissue 1996), and negligence. We conclude as a matter of law that Galaxy is entitled to recover under its statutory strict liability claim.

BACKGROUND

Galaxy provides distance learning services to schools throughout southeastern Nebraska utilizing a fiber-optic cable network. Theisen is a construction contractor specializing in highway grading work. Approximately 95 percent of Theisen's business involves highway projects of the Nebraska Department of Roads.

The Act was enacted in Nebraska in 1994. 1994 Neb. Laws, L.B. 421. The legislative intent as expressly stated in the Act was to establish a means by which excavators may notify operators of underground facilities in an excavation area so that operators have the opportunity to identify and locate the underground facilities prior to excavation and so that the excavators may then observe proper precautions to safeguard the underground facilities from damage.

§ 76-2302(1). The purpose of the Act is “to aid the public by preventing injury to persons and damage to property and the interruption of utility services resulting from accidents caused by damage to underground facilities.” § 76-2302(2).

The Act provides that “[o]perators of underground facilities shall become members of and participate in the statewide one-call notification center.” § 76-2318. The term “underground facility” as used in the Act includes buried fiber-optic cables. § 76-2317. The statewide one-call notification center established by the Act is governed by a board of directors which is responsible for selecting a vendor to “provide the notification service,” establish cost-sharing procedures among members, and “do all other things necessary to implement the purpose of the center.” § 76-2319. At all times relevant to this action, Diggers Hotline of Nebraska (Diggers Hotline) was the vendor selected to perform these tasks.

The Act requires operators of underground facilities to provide information to the center concerning the location of such facilities. § 76-2320. At the time of the events which are the subject of this action, § 76-2321 provided:

(1) A person shall not commence any excavation without first giving notice to every operator. An excavator's notice to the center shall be deemed notice to all operators. An excavator's notice to operators shall be ineffective for purposes of this subsection unless given to the center. Notice to the center shall be given at least two full business days, but no more than ten business days, before commencing the excavation, except notice may be given more than ten business days in advance when the excavation is a road construction, widening, repair, or grading project provided for in [Neb. Rev. Stat. §] 86-334

[(Reissue 1999)]. An excavator may commence work before the elapse of two full business days when (a) notice to the center has been given as provided by this subsection and (b) all the affected operators have notified the excavator that the location[s] of all the affected operator's underground facilities have been marked or that the operators have no underground facilities in the location of the proposed excavation.

(2) The notice required pursuant to subsection (1) of this section shall include (a) the name and telephone number of the person making the notification, (b) the name, address, and telephone number of the excavator, (c) the location of the area of the proposed excavation, including the range, township, section, and quarter section, unless the area is within the corporate limits of a city or village, in which case the location may be by street address, (d) the date and time excavation is scheduled to commence, (e) the depth of excavation, (f) the type and extent of excavation being planned, including whether the excavation involves tunneling or horizontal boring, and (g) whether the use of explosives is anticipated.

The Act further provides that upon receipt of such notice from excavators, "[t]he center shall inform the excavator of all operators to whom such notice will be transmitted and shall promptly transmit such notice to every operator having an underground facility in the area of intended excavation." § 76-2322.

The Act requires that operators receiving notice from the center of a planned excavation "shall advise the excavator of the approximate location of underground facilities in the area of the proposed excavation by marking or identifying the location of the underground facilities with stakes, flags, paint, or any other clearly identifiable marking or reference point." § 76-2323(1). The Act further specifies that marking or identification of underground facilities

shall be done in a manner that will last for a minimum of five business days on any nonpermanent surface and a minimum of ten business days on any permanent surface. If the excavation will continue for longer than five business days, the operator shall remark or reidentify the location of the

underground facility upon the request of the excavator. The request for remarking or reidentification shall be made through the center.

§ 76-2323(2).

In May 1997, Theisen began work on a project for the Nebraska Department of Roads which involved grading a 6-mile segment of Nebraska Highway 2 being widened between Syracuse and Unadilla, Nebraska. At the beginning of this project, Theisen filed "locate requests" with Diggers Hotline for the six quarter sections of land involved in the project. The "contractor work date" listed on all six locate request forms was May 6, 1997.

After Theisen filed its locate requests, Diggers Hotline contacted all operators having underground facilities in the six quarter sections designated by Theisen. Galaxy received notice with respect to its fiber-optic cable located in one of these quarter sections, and it marked the location of that cable. At that time, Galaxy had no cables in the other five quarter sections.

Approximately 1 year later, in the spring of 1998, Galaxy installed a new underground fiber-optic cable in one of the other quarter sections along Highway 2 between Syracuse and Unadilla which had been designated by Theisen in the locate requests submitted to Diggers Hotline on May 2, 1997. In July 1998, Galaxy notified Diggers Hotline of the existence and location of this new cable. Theisen did not contact Diggers Hotline at any time after May 2, 1997. On April 7, 1999, while performing excavation work in connection with the ongoing highway widening project, Theisen struck and damaged the cable which Galaxy had installed in 1998.

Galaxy filed this action for damages, alleging alternate theories of strict liability under the Act and negligence. Both parties filed motions for partial summary judgment as to the statutory strict liability claim. The district court granted partial summary judgment in favor of Theisen, concluding as a matter of law that Theisen was not strictly liable under the Act. After a subsequent bench trial on the issue of liability under Galaxy's negligence theory, the district court found in favor of Theisen and dismissed Galaxy's petition. Galaxy filed this timely appeal.

ASSIGNMENTS OF ERROR

Galaxy assigns, restated, that the trial court erred (1) in concluding that Theisen was not strictly liable as a matter of law under the Act and (2) in finding that Theisen was not liable under a negligence theory.

STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law. *Eyl v. Ciba-Geigy Corp.*, 264 Neb. 582, 650 N.W.2d 744 (2002); *Volquardson v. Hartford Ins. Co.*, 264 Neb. 337, 647 N.W.2d 599 (2002). When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Eyl v. Ciba-Geigy Corp.*, *supra*; *Luethke v. Suhr*, 264 Neb. 505, 650 N.W.2d 220 (2002).

ANALYSIS

In its first assignment of error, Galaxy contends that the trial court erred as a matter of law in dismissing its strict liability claim. Galaxy argues that Theisen is strictly liable under § 76-2324 because Theisen failed to give notice of the 1999 excavation and, alternatively, that Theisen is strictly liable even if it gave notice of the 1999 excavation because Galaxy fully complied with the provisions of the Act. Pursuant to § 76-2324, which states in part:

An excavator who fails to give notice of an excavation pursuant to section 76-2321 and who damages an underground facility by such excavation shall be strictly liable to the operator of the underground facility for the cost of all repairs to the underground facility. An excavator who gives the notice and who damages an underground facility shall be liable to the operator for the cost of all repairs to the underground facility unless the damage to the underground facility was due to the operator's failure to comply with section 76-2323.

According to the first sentence of this statute, the threshold question is whether Theisen gave proper notice under § 76-2321 prior to the excavation that damaged Galaxy's cable. At the time of the excavation, the notice requirement was as follows:

Notice to the center shall be given at least two full business days, but no more than ten business days, before

commencing the excavation, except notice may be given more than ten business days in advance when the excavation is a road construction, widening, repair, or grading project provided for in section 86-334.

§ 76-2321(1). We note that effective January 1, 2003, Neb. Rev. Stat. § 86-334 (Reissue 1999) was recodified as Neb. Rev. Stat. § 86-708 (Cum. Supp. 2002) and that the reference to that statute in § 76-2321 was amended accordingly. 2002 Neb. Laws, L.B. 1105, §§ 413 and 496. Because the operative facts in this case occurred prior to the recodification, we refer to the statutes as codified prior thereto.

It is undisputed that the only notice given by Theisen to Diggers Hotline occurred in May 1997, more than 10 business days before Theisen commenced the April 1999 excavation during which it struck and damaged Galaxy's fiber-optic cable. Therefore, unless the notice exception in § 76-2321(1) applies, Theisen failed to give proper notice under the Act and is strictly liable to Galaxy for the cost of repairs to the damaged cable.

The language of the exception in § 76-2321(1) provides that notice may be given more than 10 days in advance "when the excavation is a road construction, widening, repair, or grading project provided for in section 86-334." The district court interpreted this exception to apply to all road construction projects. So construed, the exception would apply when the excavation is for "road construction," "widening," "repair," or when the excavation is a "grading project provided for in section 86-334."

[2] We disagree with this interpretation. A court must place on a statute a reasonable construction which best achieves the statute's purpose, rather than a construction which would defeat the statute's purpose. *A-1 Metro Movers v. Egr*, 264 Neb. 291, 647 N.W.2d 593 (2002); *Premium Farms v. County of Holt*, 263 Neb. 415, 640 N.W.2d 633 (2002). The district court's expansive construction of the notice exception would, to a large degree, negate the purpose of the Act. We think it is significant that the phrase "road construction, widening, repair, or grading project" used in § 76-2321(1) corresponds to language in § 86-334, which provides:

Whenever any county or township *road construction, widening, repair, or grading project* requires, or can reasonably

be expected to require, the performance of any work within six feet of any telephone, electric transmission, or electric distribution line or its poles or anchors, notice to the owner of such line, poles, or anchors shall be given by the respective county or township officers in charge of such projects. Such notice shall be given at least thirty days prior to the start of any work when, because of *road construction, widening, repair, or grading*, or for any other reason, it is necessary to relocate such line or any of its poles or anchors. (Emphasis supplied.) Because the exception to the notice requirement in § 76-2321(1) mirrors the language used to define the scope of § 86-334, we conclude that the exception is intended to apply only with respect to those projects falling within that scope.

The remaining question, then, is whether the road construction project on which Theisen was working at the time it cut Galaxy's fiber-optic cable falls within § 86-334. The plain language of that statute provides that it is applicable to road construction, widening, repair, or grading projects, undertaken by counties and townships, which require work within 6 feet of any telephone, electric transmission, or electric distribution lines and related structures. The statute makes no reference to similar work on state highway projects; nor does it include any reference to fiber-optic cable. Because Theisen was working on a state highway road construction project at the time it struck and damaged Galaxy's fiber-optic cable, which fact is undisputed, the § 86-334 exception to the notice requirement in § 76-2321(1) is inapplicable. The district court erred as a matter of law in determining that Theisen's failure to provide notice within 10 days prior to the excavation fell within the exception set forth in § 76-2321(1).

Because it did not give proper and timely notice under the Act, Theisen is strictly liable for the cost of all repairs to Galaxy's fiber-optic cable under § 76-2324. The district court therefore erred as a matter of law in failing to grant Galaxy's motion for partial summary judgment on its strict liability claim. This error necessitates a reversal and remand for a determination of damages, and because Galaxy sought the same damages under each of its alternate theories of recovery, we need not reach Galaxy's assignment of error relating to its negligence claim.

CONCLUSION

The notice given to Diggers Hotline by Theisen was given more than 10 days prior to the commencement of the excavation that resulted in damage to Galaxy, and the notice exception in § 76-2321 does not apply to the undisputed facts of this case. The judgment of the district court is reversed, and the cause is remanded for further proceedings to determine the amount of damages which Galaxy is entitled to recover for the cost of repairing the cable damaged by Theisen.

REVERSED AND REMANDED FOR
FURTHER PROCEEDINGS.

HENDRY, C.J., not participating.

SHIRLEY FINCH, APPELLANT, v. FARMERS INSURANCE EXCHANGE,
AN INTERINSURANCE EXCHANGE, APPELLANT, AND PAFCO
GENERAL INSURANCE COMPANY, APPELLEE.

656 N.W.2d 262

Filed February 7, 2003. No. S-01-1336.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Summary Judgment: Final Orders: Appeal and Error.** Although the denial of a motion for summary judgment, standing alone, is not a final, appealable order, when adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy that is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct further proceedings as it deems just.
4. **Insurance: Contracts.** An insurance policy is a contract.
5. **Insurance: Contracts: Intent.** An insurance contract is to be construed as any other contract to give effect to the parties' intentions at the time the contract was made.
6. **Contracts.** When the terms of a contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as the ordinary or reasonable person would understand them.

7. **Insurance: Contracts.** While an ambiguous insurance policy will be construed in favor of the insured, ambiguity will not be read into policy language which is plain and unambiguous in order to construe against the preparer of the contract.
8. ____: _____. Unless the facts dictate otherwise, the declarations page is part of the insurance policy and is incorporated by reference into the policy.

Appeal from the District Court for Douglas County: GERALD E. MORAN, Judge. Affirmed.

Daniel P. Chesire and Raymond E. Walden, of Lamson, Dugan & Murray, L.L.P., for appellants.

Larry E. Welch, Jr., of Welch Law Firm, P.C., for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

Shirley Finch brought this declaratory judgment action in Douglas County District Court against Farmers Insurance Exchange (Farmers) and PAFCO General Insurance Company (PAFCO). In a separate action, Finch had been named as a defendant in a lawsuit filed by Florence Sherman, who claimed she suffered damages as a result of a June 11, 1998, automobile accident involving Sherman and Finch. At the time of the accident, Finch was driving a vehicle owned by Jeffrey Willis and insured by PAFCO under a policy covering the period March 27 to September 27, 1998 (the March 27 policy). Also at the time of the accident, Finch owned a vehicle which was insured under an automobile insurance policy issued by Farmers. In the declaratory judgment action, Finch sought a declaration as to which liability insurance policy, if any, provided coverage with respect to the June 11 accident and had a duty to defend Finch in the Sherman litigation.

PAFCO and Finch filed motions for summary judgment. The district court determined that the March 27 policy excluded Finch as a driver and that, therefore, the March 27 policy did not provide coverage relative to the accident. The district court further determined that Finch's Farmers policy covered the accident. Based on these determinations, the district court granted

PAFCO's motion for summary judgment against Finch, denied Finch's motion for summary judgment against PAFCO, and granted Finch's motion for summary judgment against Farmers. Finch's declaratory judgment action against PAFCO was dismissed, and judgment entered in conformity with the determinations of the district court. Finch and Farmers appeal the district court's order sustaining PAFCO's motion for summary judgment and overruling Finch's motion for summary judgment against PAFCO. We affirm.

STATEMENT OF FACTS

On June 11, 1998, Finch was involved in an automobile accident with Sherman in Omaha, Nebraska. At the time of the accident, Finch was driving a 1986 Jeep Wagoneer owned by Willis. Willis and Finch had been residing together for approximately 19 years, and Finch was driving the Wagoneer with Willis' permission. On June 11, Finch's car was in the shop for repairs.

At the time of the accident, the Wagoneer was a covered vehicle under an automobile liability insurance policy issued by PAFCO to Willis. On November 21, 1997, Willis had first applied for PAFCO liability insurance on a 1980 Buick which he owned. According to the evidence, Willis was told by the insurance agent who was taking his application that all members of the household had to be listed as drivers under the policy or be excluded. In this connection, Willis initialed the following statement in the application: "I understand that failure to disclose all operators in household will jeopardize my coverage." Willis requested that Finch be excluded from coverage under the policy. Willis signed the application form and separately executed the "Driver Exclusion" portion of the application that provided as follows: "I understand that this policy will not provide coverage when any vehicle is driven by the following person(s): Shirley Finch." According to Willis' testimony, he knew Finch was excluded from coverage initially and under the March 27 policy.

PAFCO issued a liability insurance policy covering Willis' 1980 Buick effective November 21, 1997. The policy's declarations page denominated the insurance as a "New Policy" and stated that "[t]his declarations page with policy provisions and endorsements, if any, completes the . . . policy." Under the section

of the declarations page labeled "Policy Forms and Endorsements," Finch was identified as an excluded driver, with the language "EXCLD-SHIRLEY FINCH."

After the policy was issued, Willis failed to pay his premium when due, and coverage was canceled. On February 1, 1998, at Willis' request and following the payment of his premium, the policy was "rewritten." A new declarations page was issued setting forth identical insurance coverage as the original policy and again stating that the declarations page with policy provisions and endorsements constituted the policy. Under the section of the declarations page labeled "Policy Forms and Endorsements," the rewritten policy identified Finch as an excluded driver.

Willis again failed to pay his insurance premium when due, and coverage was canceled. On or about March 27, 1998, the policy was again rewritten. At this time, Willis added the Wagoneer as an additional covered vehicle under the policy. The rewritten policy listing both the Buick and Wagoneer is the March 27 policy, effective on that date. Other than the addition of the Wagoneer and the resulting increased insurance premium, the insurance coverage was identical to the previously-issued policies. Specifically, the March 27 policy's declarations page identified Finch as an excluded driver and stated that "[t]his declarations page with policy provisions and endorsements, if any, completes the . . . policy." On June 11, 1998, while driving the Wagoneer, Finch was involved in an automobile accident with Sherman. There is no dispute among the parties to the present appeal that the Wagoneer was a covered vehicle under the March 27 policy or that the March 27 policy was the PAFCO policy then in effect at the time of the accident.

In August 1999, Sherman filed a lawsuit against Finch, alleging negligence and seeking damages as a result of the automobile accident. Thereafter, Finch filed this declaratory judgment action. In her amended petition filed on January 12, 2001, against PAFCO and Farmers, Finch sought a judicial determination as to which insurance policy provided coverage and which company had an obligation to defend Finch in the lawsuit brought by Sherman.

PAFCO filed its answer on February 15, 2001, and denied coverage, claiming Finch was an excluded driver under the March 27

policy. In its answer to the amended petition, Farmers denied coverage for reasons that are not relevant to the pending appeal.

Finch moved for summary judgment against both PAFCO and Farmers. PAFCO filed a motion for summary judgment against Finch. An evidentiary hearing on the motions for summary judgment was held on September 4, 2001, and continued on September 27. A total of 13 exhibits were admitted into evidence.

In a memorandum and order filed November 6, 2001, the district court determined that Finch was an excluded driver under the March 27 policy, granted PAFCO's motion for summary judgment against Finch, overruled Finch's motion for summary judgment against PAFCO, and granted Finch's summary judgment motion against Farmers. The district court concluded that Finch's accident with Sherman was covered under the Farmers insurance policy.

Finch appeals the district court's order sustaining PAFCO's motion for summary judgment and overruling her motion for summary judgment against PAFCO. Farmers joins Finch's appeal. Farmers has not appealed the district court's order granting Finch's motion for summary judgment against Farmers.

ASSIGNMENT OF ERROR

On appeal, Finch and Farmers assert three assignments of error which can be restated as one. Finch and Farmers claim the district court erred in determining that Finch was an excluded driver under the March 27 policy and entering summary judgment in PAFCO's favor.

STANDARDS OF REVIEW

[1,2] Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. Neb. Rev. Stat. § 25-1332 (Cum. Supp. 2002). See, also, *Soukop v. ConAgra, Inc.*, 264 Neb. 1015, 653 N.W.2d 655 (2002). In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all

reasonable inferences deducible from the evidence. *Egan v. Stoler*, ante p. 1, 653 N.W.2d 855 (2002).

[3] Although the denial of a motion for summary judgment, standing alone, is not a final, appealable order, when adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy that is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct further proceedings as it deems just. *Hogan v. Garden County*, 264 Neb. 115, 646 N.W.2d 257 (2002).

The interpretation of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination made by the lower court. *American Fam. Mut. Ins. Co. v. Hadley*, 264 Neb. 435, 648 N.W.2d 769 (2002); *Tighe v. Combined Ins. Co. of America*, 261 Neb. 993, 628 N.W.2d 670 (2001).

ANALYSIS

The issue before this court is the propriety of the entry of summary judgment in favor of PAFCO and against Finch based on the district court's determination that Finch was an excluded driver under the March 27 policy. On appeal, Finch and Farmers claim that Finch was not an excluded driver under the March 27 policy, and in this regard, they note that Willis did not execute a new application, including a new driver exclusion provision, in connection with the March 27 policy. Finch and Farmers contend that the language of the March 27 policy is ambiguous. We reject the arguments of Finch and Farmers.

[4-7] An insurance policy is a contract. *American Fam. Mut. Ins. Co.*, *supra*; *Callahan v. Washington Nat. Ins. Co.*, 259 Neb. 145, 608 N.W.2d 592 (2000). An insurance contract is to be construed as any other contract to give effect to the parties' intentions at the time the contract was made. *American Fam. Mut. Ins. Co.*, *supra*; *Farmers Union Co-op Ins. Co. v. Allied Prop. & Cas.*, 253 Neb. 177, 569 N.W.2d 436 (1997). When the terms of a contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as the ordinary or reasonable person would understand

them. *American Fam. Mut. Ins. Co., supra*; *Cincinnati Ins. Co. v. Becker Warehouse, Inc.*, 262 Neb. 746, 635 N.W.2d 112 (2001). While an ambiguous insurance policy will be construed in favor of the insured, ambiguity will not be read into policy language which is plain and unambiguous in order to construe against the preparer of the contract. *American Fam. Mut. Ins. Co., supra*; *Tighe v. Combined Ins. Co. of America, supra*.

In the instant case, there is no dispute that Willis was insured by PAFCO on June 11, 1998, that the PAFCO policy in effect on that day was the March 27 policy, and that the Wagoneer was a covered vehicle under that policy. The issue in this case involves the claim by Finch and Farmers that because Willis did not execute a new application form including a driver exclusion provision in connection with the March 27 policy, the policy is ambiguous. This claim by Finch and Farmers is incorrect as a matter of law.

[8] The record contains the documents which taken together compose the March 27 policy, and the policy thus constituted unambiguously provides that Finch is excluded. The declarations page states that “[t]his declarations page with policy provisions and endorsements, if any, completes the . . . policy.” It has been held, and we agree, that unless the facts dictate otherwise, the declarations page is part of the insurance policy and is incorporated by reference into the policy. *Ruiz v. State Wide Insulation and Const.*, 269 A.D.2d 518, 703 N.Y.S.2d 257 (2000). See, also, 2 Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* 3d § 21:21 at 21-42 (1997) (“[e]ndorsements, riders, marginal references, and other similar writings are a part of the contract of insurance and are to be read and construed with the proper policy”).

In this case, the declarations page contains a section entitled “Policy Forms and Endorsements,” below which are listed the following: “2000004,” “NE1,” “A1091,” “EXCLD-SHIRLEY FINCH.” Referring to the expression “EXCLD-SHIRLEY FINCH,” it is clear that this phrase on the declarations page signifies that Finch is an excluded driver. It is also clear that this declarations page term, along with endorsements and policy provisions, “completes . . . the policy.” Thus the term excluding Finch contained in the declarations page is a provision of the

policy, and, contrary to the assertion of Finch and Farmers, the effectiveness of this provision is not conditioned upon the execution of a new application form including a driver exclusion provision. For the sake of completeness, we note that “2000004” refers to a multipage booklet, “NE1” refers to the “Nebraska Endorsement,” and “A1091” refers to “Underinsured Motorists Coverage.” “NE1” and “A1091” are attached to the booklet. By its express and plain terms, the insurance contract which was in effect at the time of the accident was a contract made up of the declarations page, the policy booklet, and the endorsement forms, and the declarations page specifically excluded Finch. We conclude as a matter of law that the March 27 policy with PAFCO was unambiguous and excluded Finch from coverage. See, *American Fam. Mut. Ins. Co. v. Hadley*, 264 Neb. 435, 648 N.W.2d 769 (2002); *Tighe v. Combined Ins. Co. of America*, 261 Neb. 993, 628 N.W.2d 670 (2001).

Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. Neb. Rev. Stat. § 25-1332 (Cum. Supp. 2002). See, also, *Soukop v. ConAgra, Inc.*, 264 Neb. 1015, 653 N.W.2d 655 (2002). We conclude that there is no genuine issue as to any material fact and that PAFCO was entitled to summary judgment as a matter of law. Accordingly, there is no merit to Finch and Farmers’ appeal, and we affirm the district court’s order which granted PAFCO’s motion for summary judgment on the ground that Finch was an excluded driver under the March 27 policy and denied Finch’s motion for summary judgment.

CONCLUSION

The declarations page which forms a part of the March 27 policy excludes Finch from coverage under the policy as a matter of law. For the reasons stated herein, we affirm the district court’s decision granting PAFCO’s motion for summary judgment against Finch and denying Finch’s motion for summary judgment against PAFCO.

AFFIRMED.

DAVID L. FORD, APPELLANT, v. THE ESTATE OF
MARK B. CLINTON, DECEASED, APPELLEE.

656 N.W.2d 606

Filed February 14, 2003. No. S-01-1082.

1. **Trial: Evidence: Appeal and Error.** The admission of demonstrative evidence is within the discretion of the trial court, and a judgment will not be reversed on account of the admission or rejection of such evidence unless there has been a clear abuse of discretion.
2. **Trial: Expert Witnesses: Appeal and Error.** The admission of expert testimony is ordinarily within the trial court's discretion, and its ruling will be upheld absent an abuse of discretion.
3. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
4. **Trial: Evidence: Testimony: Proof.** Demonstrative exhibits are admissible if they supplement the witness' spoken description of the transpired event, clarify some issue in the case, and are more probative than prejudicial.
5. ____: ____: ____: _____. Demonstrative exhibits are inadmissible when they do not illustrate or make clearer some issue in the case; that is, where they are irrelevant or where the exhibit's character is such that its probative value is substantially outweighed by the danger of unfair prejudice.
6. **Trial: Evidence.** Evidence relating to an illustrative experiment is admissible if a competent person conducted the experiment, an apparatus of suitable kind and condition was utilized, and the experiment was conducted fairly and honestly.
7. ____: _____. It is not essential that conditions existing at the time of an illustrative experiment be identical with those existing at the time of the occurrence, but they should be essentially similar, that is, similar in all those factors necessary to make the comparison a fair and accurate one. The lack of similarity regarding nonessential factors then goes to the weight of the evidence rather than to its admissibility.
8. **Trial: Waiver: Appeal and Error.** A litigant's failure to make a timely objection waives the right to assert prejudicial error on appeal.
9. **Trial: Evidence: Appeal and Error.** One may not, on appeal, assert a different ground for excluding evidence than was urged in the objection made to the trial court.
10. **Trial: Appeal and Error.** Where the grounds specified for the objection at trial are different from the grounds advanced on appeal, nothing has been preserved for an appellate court to review.
11. **Trial: Evidence.** An objection on the basis of insufficient foundation is a general objection.
12. **Trial: Evidence: Appeal and Error.** If a general objection on the basis of insufficient foundation is overruled, the objecting party may not complain on appeal unless (1) the ground for exclusion was obvious without stating it or (2) the evidence was not admissible for any purpose.

Appeal from the District Court for Kimball County: KRISTINE
R. CECAVA, Judge. Affirmed.

Michael J. Javoronok, of Michael J. Javoronok Law Firm, for appellant.

Leland K. Kovarik, of Holtorf, Kovarik, Ellison & Mathis, P.C., for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

I. NATURE OF CASE

David L. Ford, the plaintiff, was working on a broken water main when he was hit by a truck driven by the defendant's decedent, Mark B. Clinton. The primary issue in this appeal is the admissibility of accident reconstruction photographs taken by Randy Westfall, who testified for the defense as an accident reconstruction expert.

II. BACKGROUND

1. FACTUAL AND PROCEDURAL

Ford, an employee of the city of Kimball, Nebraska, was struck by Clinton's truck and injured while working on a water main at approximately 4 a.m. on August 7, 1997. Ford and his coworkers were working to repair a leaking water main on Third Street in Kimball. Third Street is a three-lane street at the point of the accident: one lane for eastbound traffic, one lane for westbound traffic, and a center turn lane. Ford had parked his vehicle, a pickup truck belonging to the city of Kimball, facing west in the eastbound lane. All the lights on the vehicle were on: the headlights, hazard lights, and flashing strobe light. No other barricades or signs were placed on the street, and Ford was not wearing reflective clothing. Clinton's truck approached the scene traveling eastbound, and Clinton attempted to pass Ford's truck by driving on the side of the road to the right. Ford, who was working in the road near the front of his truck, was struck and injured by Clinton's truck. It should be noted that before Ford filed suit, Clinton was murdered, see *State v. Redmond*, 262 Neb. 411, 631 N.W.2d 501 (2001), and did not testify by deposition or at trial.

Westfall testified for the defense as an accident reconstruction expert. Westfall had received a management degree from Bellevue

University, was a certified Iowa police officer, and had over 1,000 hours of accident-related training, including training and certification as an accident reconstructionist. Westfall testified, generally, that he attempted to re-create the scene of the accident by placing a pickup truck similar to Ford's at the site of the accident. The photographs at issue were taken from a camera mounted in another pickup truck, representing Clinton's vehicle, that approached the scene and stopped at various distances for photographs to be taken. Westfall testified that an external battery was connected to the truck used to represent Clinton's vehicle, so that the truck's headlights could be left on, but the engine turned off, while photographs were taken from the truck.

Westfall testified that at the time of the reconstruction, he did not know whether Ford's truck had been equipped with a flashing strobe light or simply an amber rotating beacon, which Westfall conceded would not be as bright. The truck used for the reconstruction was equipped with an amber rotating beacon and not the brighter strobe light with which Ford's truck had been equipped. Westfall testified, however, that for the purpose of evaluating whether Ford had been visible to oncoming drivers, the presence of a beacon as opposed to a strobe light was not important. The district court, in overruling Ford's objections to Westfall's testimony, noted that the issue was not the visibility of the pickup truck, which Clinton obviously saw or he would not have driven around it, but, rather, whether Clinton should have seen Ford working by the side of the road.

Westfall also testified regarding the photographs he took of the site of the reconstruction. Westfall testified, generally, that he took a series of photographs from different positions and using different variables, that he developed the photographs in different ways, and that he then selected the photographs that, to his recollection, best represented what he had seen at the site of the reconstruction. Westfall testified that each of the photographs admitted into evidence represented what Westfall had seen at the site of the reconstruction. The district court overruled Ford's objection to the photographs and instructed the jury that the photographs were admitted for the limited purpose of demonstrating what Westfall saw on the night of his reconstruction. Ford did not object at trial to the limiting instruction.

The members of the repair crew, who were witnesses from the accident scene, testified that as part of their work, they had opened a fire hydrant east of Ford's truck. Westfall acknowledged that his reconstruction of the accident did not include an open fire hydrant and that the reconstruction did not include spraying water or wet pavement. Westfall testified that it was unnecessary for the fire hydrant to be opened during the reconstruction, because the fire hydrant was behind the truck, and that in his reconstruction, he could not see past the front of the truck. Ford did not refer specifically to the fire hydrant in objecting to Westfall's reconstruction of the accident scene.

In rebuttal, Ford presented several witnesses who had been at the scene of the accident and who testified that the photographs produced by Westfall did not represent the lighting conditions at the scene of the accident. The defense cross-examined these witnesses with respect to where they had been at the scene of the accident and whether they had observed the scene from Clinton's perspective of a motorist eastbound on Third Street. Westfall testified that he did not ask any of the witnesses if the photographs matched the perspective of the witnesses, because, as far as he was aware, none of the witnesses had approached the scene from the same direction as Clinton.

Ford presented the rebuttal testimony of Tom Feiereisen, an accident reconstruction expert, who testified at length regarding the photographs and opined that the photographs were darker than the conditions he had observed on his visits to the site of the accident. Ford also referred to a videotape made by the defense at Ford's own "visibility study" of the site of the accident, which videotape Ford's witnesses testified better represented the lighting conditions at the scene of the accident, but which Feiereisen testified did not show the clarity that was shown by the photographs. Feiereisen stated that "neither, the videotape or the photographs, show what the eye sees." Feiereisen generally testified that no photograph or videotape could accurately depict what the human eye would see at the site of the accident.

Westfall was also asked by the defense whether on the night of the accident, Clinton "[did] what was reasonable expecting a person to do given the situation he was presented with at the time." Ford objected on the basis that the question posed by the defense

“call[ed] for speculation.” Westfall’s response to the question was that in his opinion, “there was no reasonable expectation, this is an unexpected event, you can’t have an expected response.”

After trial and deliberation, the jury returned a verdict in favor of the defendant. In accordance with the jury’s verdict, Ford’s petition was dismissed by the district court. A motion for new trial, filed by Ford, was subsequently overruled. Ford timely appealed.

2. APPELLATE RECORD

We note, although it does not affect our disposition of this appeal, that there are some troubling aspects to the record presented on appeal. The transcript contains two separate file-stamped journal entries, each purporting to enter judgment in favor of the defendant and against Ford. These journal entries, and several other orders contained in the record, show significant disparities between the date reflected on the face of each order, the date on which each order was purportedly signed, and the date on which each order was eventually file stamped. In one instance, the order overruling Ford’s motion for new trial reflects a delay of 9 weeks between the date of the order and the date the order was file stamped.

Official entry of a judgment, decree, or final order, however, occurs only when the clerk of the court places the file stamp and date upon the judgment, decree, or final order. See, *Macke v. Pierce*, 263 Neb. 868, 643 N.W.2d 673 (2002); Neb. Rev. Stat. § 25-1301(3) (Cum. Supp. 2002). Failure to promptly file stamp orders causes difficulties for parties and appellate courts. Inordinate delay, such as that reflected by the record in this case, creates procedural traps for unwary litigants. Although no injustice resulted here, we take this opportunity to remind the district court of its duty to ensure that court orders are timely entered in the manner provided by statute.

III. ASSIGNMENTS OF ERROR

Ford assigns, as consolidated, that the district court abused its discretion in (1) admitting into evidence photographs that did not represent the accident scene and (2) allowing testimony as to whether Clinton was reasonable in his actions and expectations.

IV. STANDARD OF REVIEW

[1-3] The admission of demonstrative evidence is within the discretion of the trial court, and a judgment will not be reversed on account of the admission or rejection of such evidence unless there has been a clear abuse of discretion. *Benzel v. Keller Indus.*, 253 Neb. 20, 567 N.W.2d 552 (1997). The admission of expert testimony is ordinarily within the trial court's discretion, and its ruling will be upheld absent an abuse of discretion. *Gittins v. Scholl*, 258 Neb. 18, 601 N.W.2d 765 (1999). An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Holmes v. Crossroads Joint Venture*, 262 Neb. 98, 629 N.W.2d 511 (2001).

V. ANALYSIS

1. RECONSTRUCTION PHOTOGRAPHS

The first issue presented is the admissibility of the photographs made by Westfall of his reconstruction of the accident scene. Westfall testified that in his opinion, Clinton's vision was impaired by glare from the headlights of Ford's truck, and that Clinton had been unable to see Ford until just before the collision. Westfall generally based his opinion on his observations of his reconstruction of the scene of the accident and his measurements and calculations of skid marks, Clinton's speed, and the stopping distance of Clinton's truck.

The photographs at issue generally display a head-on view of the pickup truck placed by Westfall in approximately the same place as Ford's truck had been at the time of the accident. The photographs were used, essentially, to depict the reconstruction performed by Westfall and to illustrate the basis for Westfall's opinion testimony regarding the cause of the accident. Ford now complains of the photographs on several bases. Specifically, Ford argues that the photographs were misleading because (1) the reconstruction was inaccurate in that a rotating beacon was used instead of a strobe light and the fire hydrant was not opened and (2) the photographs were darker than the accident scene. Ford also contends that the photographs should not have been admitted because Ford's counsel was not invited to observe Westfall's reconstruction. We address each contention in turn.

(a) Inaccuracies in Reconstruction

[4,5] Demonstrative exhibits are admissible if they supplement the witness' spoken description of the transpired event, clarify some issue in the case, and are more probative than prejudicial. *Benzel, supra*. Demonstrative exhibits are inadmissible when they do not illustrate or make clearer some issue in the case; that is, where they are irrelevant or where the exhibit's character is such that its probative value is substantially outweighed by the danger of unfair prejudice. *Id.* Ford contends that because of differences between the reconstruction and the accident scene, the photographs were inadmissible.

It should be noted, however, that Ford does not contend on appeal that Westfall should not have been permitted to testify about his reconstruction of the accident scene or his findings at that reconstruction. Ford's appellate argument is directed at the photographs. Therefore, the question is whether the photographs were an appropriate illustration of Westfall's testimony. We conclude that they were.

The photographs were offered to illustrate for the jury the reconstruction that Westfall performed and on which his conclusions were partly based. Westfall specifically testified that his conclusions were based on his observations of the reconstructed accident scene and that the photographs offered by the defense accurately represented what Westfall had seen at the reconstructed scene. The jury was instructed that the photographs were admitted for that limited purpose.

Westfall also testified that the two deficiencies now complained of by Ford were not significant with respect to the purpose of the reconstruction: to determine the visibility of Ford, and not his pickup truck, at the time of the accident. Westfall explained that a strobe light on the truck, as opposed to the amber beacon used for the reconstruction, would have made the truck more visible, but not the person standing in Ford's position relative to the truck. Westfall also stated that the open fire hydrant would not have made a difference because it was behind the truck, while Westfall was unable to see past the front of the truck at the reconstruction.

[6,7] Evidence relating to an illustrative experiment is admissible if a competent person conducted the experiment, an apparatus

of suitable kind and condition was utilized, and the experiment was conducted fairly and honestly. *Kudlacek v. Fiat S.p.A.*, 244 Neb. 822, 509 N.W.2d 603 (1994); *Shover v. General Motors Corp.*, 198 Neb. 470, 253 N.W.2d 299 (1977). It is not essential that conditions existing at the time of the experiment be identical with those existing at the time of the occurrence, *Shover, supra*, but they should be essentially similar, that is, similar in all those factors necessary to make the comparison a fair and accurate one. See *Rullo v. General Motors Corp.*, 208 Conn. 74, 543 A.2d 279 (1988). The lack of similarity regarding nonessential factors then goes to the weight of the evidence rather than to its admissibility. See, *Kudlacek, supra*; *Rullo, supra*.

In this case, Westfall—whose expertise is not questioned on appeal—testified that the conditions of the reconstruction were essentially similar to the accident scene and that the photographs accurately depicted his observations of the reconstruction. The district court accepted this foundational testimony and instructed the jury that the photographs were admitted for the limited purpose of illustrating what Westfall saw at the reconstruction. Compare *Kudlacek, supra* (courts have allowed videotape as illustration where judge told jury that videotape is only visual illustration and not proof). The court's determination was not untenable or unreasonable, and thus, we find no abuse of discretion.

(b) Darkness of Photographs

Ford also argues that the photographs were developed in a way that made the scene appear darker than the actual accident scene had been. Ford presented witness testimony to that effect and contends that the dissimilarity rendered the photographs inadmissible.

However, Westfall testified that the photographs accurately represented what he had seen at the reconstruction. The photographs were admitted for the purpose of illustrating what Westfall had seen at the reconstruction. Westfall's testimony, therefore, provided adequate foundation for the admission of the photographs as illustrative evidence.

Westfall also explained that the witnesses to the accident had differing views of the scene and that their perspectives on the accident scene would be different from that of the driver of an

eastbound vehicle. Thus, the testimony of the witnesses, that the photographs did not represent what they saw on the night of the accident, is not inconsistent with Westfall's testimony regarding what he saw, from Clinton's re-created perspective, at the reconstruction of the accident scene.

Given Westfall's testimony in this regard, any discrepancies between the photographs and the testimony of the accident witnesses go not to the admissibility of the photographs, but to the weight to be given Westfall's testimony. Ford had ample opportunity to cross-examine Westfall with respect to the darkness of the photographs, and the strobe light and the fire hydrant, and to list and explain the differences between the photographs and the testimony of Ford's witnesses. Compare *Hueper v. Goodrich*, 263 N.W.2d 408 (Minn. 1978). Ford also had the opportunity to present expert testimony in rebuttal to Westfall's testimony. Given Ford's opportunity to present his arguments regarding the photographs to the jury, we again find no abuse of discretion.

(c) Notice of Reconstruction

Ford concedes that his counsel "'doesn't have any right to be at [the defense's] re-enactment . . . unless the court deems that he has a right to be there.'" Brief for appellant at 17. Nonetheless, Ford contends that "fundamental fairness" requires a party to notify the opposing party of any reenactment. *Id.*

Ford relies on *Balian, et al. v. General Motors*, 121 N.J. Super. 118, 296 A.2d 317 (1972). In that case, the defendant prepared and filmed an experiment, without notice to the plaintiffs, just before trial and after discovery had been completed. The defendant contended that no notice of the experiment was required because the film had not been in existence at the time of the defendant's compliance with the plaintiffs' discovery requests. On appeal, the Superior Court of New Jersey stated:

A motion picture in the eyes of the jury is one of [the] most spectacular forms of evidence. It is cumulative in nature. There are inherent dangers in its preparation and presentation. Effective rebuttal can only be had if opposing counsel and his expert are given an adequate opportunity to meet such evidence. We do not consider that cross-examination alone would ordinarily provide a sufficient

avenue of rebuttal to the adverse party. Consequently, as a prerequisite to the admission into evidence of motion pictures of a reconstructed event or a posed demonstration *taken during the pendency of an action*, fundamental fairness dictates that the party proposing to offer such evidence give notice thereof and an opportunity to his adversary to monitor the experiment and the taking of the film. (Emphasis supplied.) *Balian, et al.*, 121 N.J. Super. at 131, 296 A.2d at 324.

Balian, et al. is distinguishable from the case at bar. The reasoning of *Balian, et al.* was specifically predicated on the evidence being motion pictures, as opposed to still photographs. More significant, however, is the fact that the issue in *Balian, et al.* was not a general right to be present at an opposing party's reconstruction. *Balian, et al.* instead dealt with compliance with discovery requests, unfair surprise, and the ability of an opposing party to effectively respond to evidence presented at trial. Those issues are not presented in this case. While Ford was not present at Westfall's reconstruction, Ford does not argue that the defense failed to comply with court-ordered discovery regarding Westfall's proposed testimony or that Ford was unprepared to cross-examine Westfall or rebut his testimony at trial. The record, in fact, indicates the contrary.

Ford also fails to identify how, if at all, he was unfairly prejudiced by his failure to observe Westfall's reconstruction. Ford's complaint regarding the photographs is that they are not sufficiently similar to the scene of the actual accident. Ford does not identify how this would have changed if he had been present at the reconstruction. It is doubtful that opposing parties seek to be present at a reconstruction in order to assist one another in establishing the admissibility of their respective expert testimony and demonstrative evidence.

For the foregoing reasons, we reject Ford's argument that he had a legal right to be present at Westfall's reconstruction of the accident scene. We find no abuse of discretion, on this basis or the bases previously discussed, in the district court's overruling of Ford's objection to the photographs taken by Westfall at his reconstruction of the accident scene. Ford's first assignment of error is without merit.

(d) Limiting Instruction

Ford also complains that the district court's limiting instruction was erroneous, in that the court instructed the jury that the photographs were more probative than prejudicial. Although Ford's brief argues that the court's limiting instruction was erroneous, he does not specifically assign error to the limiting instruction or contend that the limiting instruction is itself basis for reversal; rather, the argument is presented as another reason that the photographs were purportedly inadmissible.

We first note that the record does not support Ford's interpretation of the court's actions. Ford's complaint is directed at the following exchange, quoted as relevant, which occurred when the defense made its first offer of one of Westfall's photographs into evidence:

[Defense counsel]: I offer Exhibit No. [158].

[Plaintiff's counsel]: Your Honor, I'm going to object on foundation and more specifically that that doesn't represent the accident that happened in this case. Mr. Ford's vehicle was available with the right stroboscopic light on it, second of all we were not notified of this particular experiment or re-enactment going on and when it happened it is inaccurate, it would mislead the jury and the prejudice that would be shown by this photograph with the preverbal [sic] dimmer bulb than a brighter strobe out weights [sic] any probative value it has. Thank you.

THE COURT: It is the finding of the court that Exhibit No. [158]

THE COURT: . . . is, first of all a demonstration and it is not the actually [sic] accident, no one has pictures of the actual accident. And the court does find that although there are some differences in the strobe light being whether it was strobe light and a beacon being one of them, that it is sufficiently, sufficiently alike. The depositions and the other information that was available to make it more probative th[a]n prejudicial and therefore it is admitted for the limited purposes of demonstrating what Mr. Westfall saw the night that he re-enacted it being fully — fully knowledgeable as it's been brought out here that there were some

differences that existed between the actual night of the accident and his re-enactment.

You as a jury are directed to understand the limited purpose for which it is admitted.

....

[Plaintiff's counsel]: Your Honor, just so that we're clear and also in the interest of saving time I would like to have a continuing objection to all these photographs on the same basis And so we'll speed things along, [defense counsel] would you stipulate that I have a continuing objection on the same basis?

[Defense counsel]: Yes, I'll stipulate to that.

[Plaintiff's counsel]: Thank you.

The above colloquy is the extent of the relevant comments to the jury regarding the admission of the photographs. Our reading of the record is that the court made the findings necessary to support its overruling of Ford's evidentiary objection, albeit somewhat inartfully, then proceeded to instruct the jury regarding the limited purpose for which the photographs were admitted. We see no abuse of discretion in this regard. Ford made his evidentiary objection and chose to argue the objection in the presence of the jury and cannot now complain that the court's ruling on the objection was also made in the presence of the jury. Compare, e.g., *Boyd v. Lynch*, 493 So. 2d 1315 (Miss. 1986); *Aldridge v. State*, 236 Ga. 773, 225 S.E.2d 421 (1976) (appellants waived error by failing to object to conducting proceedings in presence of jury). Furthermore, the court later "reminded" the jury, after more of the photographs were offered into evidence, that the photographs were "admitted for the limited purpose as a demonstration of what Mr. Westfall saw when he re-enacted — the re-enactment he testified to and taking into account that there are differences." Any confusion present in the first limiting instruction was subsequently cured by the court's clarification of the purpose for which the photographs had been admitted.

[8] Finally, we note that, as the above quotation from the record makes clear, Ford made no objection at trial based on any perceived error in the district court's limiting instruction. A litigant's failure to make a timely objection waives the right to assert prejudicial error on appeal. *Davis v. Wimes*, 263 Neb. 504,

641 N.W.2d 37 (2002). Ford did not make any objection at trial which would have afforded the court the opportunity to cure any defect in the limiting instruction; Ford therefore failed to preserve any such argument for appellate review.

2. REASONABLENESS OF CLINTON'S ACTIONS

Ford assigns that the district court "erred in allowing testimony as to opinion of whether [Clinton] was reasonable in his actions and expectations." Ford presents little argument in his brief in support of this assignment of error, and it is difficult to discern precisely on what basis he contends that the testimony should have been excluded. It is clear, however, that Ford's complaint relates to the following colloquy from direct examination of Westfall:

[Defense counsel:] Do you have an opinion based upon your training and experience in safety and automobiles and all of the subjects that you testified about earlier having received training in whether or not . . . Clinton, as he drove to the right of the pickup in front of him, drove as would be reasonably be anticipated given the situation he was presented with?

[Plaintiff's counsel]: Your Honor, I'm going to object on form and foundation, this calls for speculation on the part of the witness as to what . . . Clinton could be anticipated to do.

THE COURT: Overruled, you may answer.

[Westfall:] I hate to have you repeat that but it was so long, was that expected?

[Defense counsel:] Did [Clinton] do what was reasonable expecting a person to do given the situation he was presented with at the time.

[Plaintiff's counsel]: Same objection.

THE COURT: Overruled.

[Westfall:] In my opinion there was no reasonable expectation, this is an unexpected event, you can't have an expected response.

[Defense counsel]: No further questions, Your Honor.

[9,10] As the foregoing colloquy indicates, the objection made by Ford at trial was that the question posed by the defense

called for speculation on the part of the witness. The argument in Ford's appellate brief, however, is not that the testimony was speculative. One may not, on appeal, assert a different ground for excluding evidence than was urged in the objection made to the trial court. *Benzel v. Keller Indus.*, 253 Neb. 20, 567 N.W.2d 552 (1997). Where the grounds specified for the objection at trial are different from the grounds advanced on appeal, nothing has been preserved for an appellate court to review. *Id.* Ford has waived any valid objection that might have been made to Westfall's opinion testimony.

Furthermore, we note that to the extent we can determine the basis of Ford's appellate argument, it seems to be that the testimony given by Westfall addressed the ultimate issue to be decided in the case. However, testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. Neb. Rev. Stat. § 27-704 (Reissue 1995). More significantly, we note that whatever objection might have been appropriate to the question posed by the defense, Westfall's answer to the question did not include an opinion that Clinton's actions on the night of the accident had been reasonable. Instead, Westfall simply testified, in essence, that the circumstances prior to the accident were unexpected. While the question asked by the defense may have been objectionable, Westfall did not give any prejudicial opinion testimony in response to the question. Any error by the court in allowing the question to be asked was harmless, because Westfall's answer to the question was not prejudicial to Ford.

[11,12] The only other discernible appellate argument on this issue seems to be that Westfall was not a properly qualified expert witness. Ford's objection at trial does refer to "foundation." However, an objection on the basis of insufficient foundation is a general objection. *Sherard v. Bethphage Mission, Inc.*, 236 Neb. 900, 464 N.W.2d 343 (1991). If a general objection on the basis of insufficient foundation is overruled, the objecting party may not complain on appeal unless (1) the ground for exclusion was obvious without stating it or (2) the evidence was not admissible for any purpose. *Brown v. Farmers Mut. Ins. Co.*, 237 Neb. 855, 468 N.W.2d 105 (1991). Neither of those criteria

is met in the instant case, and no valid foundational objection has been preserved for appellate review.

Ford's second assignment of error is unsupported by any argument identifying a valid objection that was properly made at trial and preserved for appellate review. Furthermore, Westfall, in responding to the defense's question, did not give an opinion that Clinton's behavior prior to the accident had been reasonable, and any error in permitting the question to be asked was therefore harmless. Ford's second assignment of error is without merit.

VI. CONCLUSION

The district court did not abuse its discretion in overruling Ford's objection to the photographs from Westfall's reconstruction of the accident scene, and Ford failed to preserve any basis for concluding that the court committed prejudicial error by allowing the defense to ask for Westfall's opinion regarding the reasonableness of Clinton's actions. The judgment of the district court is therefore affirmed.

AFFIRMED.

GRACE L. OLSEN, APPELLANT AND CROSS-APPELLEE, V.
CHERIE OLSEN, PERSONAL REPRESENTATIVE OF THE
ESTATE OF HAROLD C. OLSEN, DECEASED,
APPELLEE AND CROSS-APPELLANT.

657 N.W.2d 1

Filed February 14, 2003. No. S-01-1271.

1. **Equity: Quiet Title.** A quiet title action sounds in equity.
2. **Equity: Appeal and Error.** In an appeal of an equitable action, an appellate court tries factual questions de novo on the record, provided that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Limitations of Actions: Quiet Title.** Neb. Rev. Stat. § 25-202 (Reissue 1989) is applicable to an action to quiet title to an interest in real estate.
4. **Equity: Estoppel: Limitations of Actions.** The elements of equitable estoppel are, as to the party estopped: (1) conduct which amounts to a false representation or concealment of material facts, or at least which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently

attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. As to the other party, the elements are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his or her injury, detriment, or prejudice. The first prong of this test is met when one lulls his or her adversary into a false sense of security, thereby causing that person to subject his or her claim to the bar of the statute of limitations, and then pleads the very delay caused by his or her conduct as a defense to the action when it is filed.

5. **Equity: Estoppel: Fraud: Limitations of Actions.** Equitable estoppel is not limited to circumstances of fraud. The doctrine of equitable estoppel may be applied to prevent an inequitable resort to a statute of limitations as well, and a defendant may, by his or her representations, promises, or conduct, be so estopped where the other elements of estoppel are present.
6. **Equity: Estoppel.** Equity is determined on a case-by-case basis when justice and fairness so require. Equity may be used under appropriate circumstances, and equitable principles may prevent one from asserting a particular defense when it would be unfair or unjust to allow that person to do so.
7. **Equity: Estoppel: Appeal and Error.** A claim of equitable estoppel rests in equity, and in an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the trial court.
8. **Equity: Laches.** Laches is an equitable defense, and, in order to benefit from the operation of laches, a party must come to the court with clean hands. Under the doctrine of unclean hands, a person who comes into a court of equity to obtain relief cannot do so if he or she has acted inequitably, unfairly, or dishonestly as to the controversy in issue.

Appeal from the District Court for Banner County: KRISTINE R. CECAVA, Judge. Affirmed in part, and in part reversed and remanded with directions.

Paul E. Hofmeister, of Chaloupka, Holyoke, Hofmeister, Snyder & Chaloupka, P.C., L.L.O., for appellant.

James M. Mathis, of Holtorf, Kovarik, Ellison & Mathis, P.C., for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

Grace L. Olsen appeals the order of the district court for Banner County granting some but not all of the relief she sought

in an action she filed against Harold C. Olsen, her subsequently deceased former husband. In the instant case, the district court quieted title to certain mineral interests which Harold was required to transfer to Grace pursuant to their divorce decree; but because the court found Grace guilty of laches, it quieted title as of February 6, 1990, the date she filed the petition in this case, rather than as of a date in 1979, when the mineral interests were purportedly transferred. Under the court's ruling, Grace did not share in proceeds attributable to the mineral interests which accrued prior to February 6, 1990.

Grace argues on appeal that the district court erred in finding her guilty of laches and therefore failing to quiet title as of 1979. Cherie Olsen, the personal representative of Harold's estate, cross-appeals on his estate's behalf and argues that Grace's action to quiet title was barred by the statute of limitations or, in the alternative, that the court's finding of laches should have completely barred relief.

We conclude that Harold, by and through Cherie, was equitably estopped from asserting the statute of limitations and, due to his unclean hands, was prevented from asserting laches. In view of our conclusions, the court correctly quieted title in Grace. However, the court erred in quieting title as of February 6, 1990, rather than August 15, 1979. We further conclude that the court erred in finding Grace guilty of laches. We therefore affirm the district court's decision in part, reverse it in part, and remand the cause for further proceedings.

STATEMENT OF FACTS

Grace and Harold were divorced pursuant to a decree of dissolution filed February 13, 1979, in the district court for Kimball County. At the time of the dissolution, Grace and Harold reached a property settlement agreement which was approved by the district court. In the decree of dissolution, the court ordered that the property of the parties be distributed in accordance with the agreement. The agreement provided, *inter alia*, that each of the parties "shall have an undivided 1/2 interest in all of the oil, gas and other minerals which are now presently owned by the parties." The agreement did not specify legal descriptions for the mineral interests owned by the parties.

Although the decree directed the parties to execute the necessary documents, it did not provide that a transfer would be deemed to have occurred in the absence of such execution.

On August 15, 1979, Grace and Harold signed a mineral deed prepared by Grace's attorney. The mineral deed was designed to carry out the property settlement agreement by purportedly transferring equal undivided mineral interests to Grace and Harold. Grace testified that the mineral deed was prepared using legal descriptions provided by Harold's sister.

Sometime in 1984, Grace learned that the 1979 mineral deed contained inaccurate legal descriptions of certain mineral interests and omitted other mineral interests owned by Harold at the time of the dissolution. Grace researched real estate records to obtain correct and complete legal descriptions. In 1985, Grace's attorney prepared a correction mineral deed to reform and supplement the 1979 mineral deed and sent the correction mineral deed to Harold with a letter requesting that he execute the correction mineral deed. Because Harold had remarried, the letter also requested that Cherie, his wife, execute the correction mineral deed. Harold met with Grace's attorney shortly thereafter and indicated that he would not sign the correction mineral deed. However, Harold did not tell Grace that he would not sign the deed.

Grace testified that over the next several years, prior to her filing the petition in the present case, she had numerous conversations with Harold about signing the correction mineral deed. He generally put her off by saying that his attorney was reviewing the deed and that he would get to it later. Grace testified that during this time, Harold never told her that he would not execute the correction mineral deed and instead indicated that he would sign it after it had been reviewed. In 1988, Harold requested Grace's assistance with his participation in a federal farm program. Grace told Harold she would cooperate if he would sign the correction mineral deed. Harold promised he would sign the deed, and Grace assisted Harold by loaning him \$60,000. Harold did not subsequently sign the deed.

In 1989, Harold and his attorney began a series of communications with Union Oil Company of California (Unocal) regarding royalties from mineral interests on one of the properties which had been misidentified in the 1979 mineral deed. Unocal

had been holding royalties in suspense since 1984 when Grace communicated her claim to a share of the royalties. In a letter to Unocal dated August 18, 1989, Harold's attorney stated that the statute of limitations had run on any action Grace might have brought to correct the legal descriptions in the 1979 mineral deed. In March 1990, Harold received a check from Unocal for royalties of \$28,795.77.

Grace filed her first petition in the present action on February 6, 1990. In the petition, Grace requested that the district court order Harold to account to her for her share of the income from the mineral interests which were omitted or misidentified in the 1979 mineral deed. Grace filed various amended petitions. The fourth amended petition was filed January 21, 1991, and is the operative petition. Grace fashioned the petition to contain what she identified as four "causes of action." In the first "cause of action," Grace sought a declaration of the mineral interest rights of each party pursuant to the property settlement agreement. In the second "cause of action," Grace requested that the court quiet title in her name to her share of the mineral interests which were omitted or misidentified in the 1979 mineral deed. In the third "cause of action," Grace sought reformation of the 1979 mineral deed to correct the omissions and errors in the legal descriptions of the mineral interests transferred. Finally, in the fourth "cause of action," Grace sought an accounting for all proceeds received by Harold which were attributable to her shares of the mineral interests omitted or misidentified in the 1979 mineral deed.

In his answer to the fourth amended petition, Harold asserted, *inter alia*, that Grace's petition was barred by the statute of limitations and that Grace was guilty of laches such that it would be inequitable to permit her to recover on the petition. We note that in her petition, Grace had alleged facts regarding Harold's representations and promises that he would sign the correction mineral deed, Harold's intent that Grace rely on such representations, and her actual reliance on such representations. We note that such facts, if proven, could support a conclusion that Harold was equitably estopped from succeeding on his defenses.

The district court held a trial on the first three "causes of action" but stayed trial on the accounting "cause of action" pending

its decision on the first three issues. Following trial, the court issued a decree filed June 7, 1993. In the decree, the court summarily found for Harold and against Grace on the first "cause of action," for a declaration of rights, and on the third "cause of action," for reformation of the mineral deed. With regard to the second "cause of action," to quiet title, the court found generally for Grace and against Harold. The court specifically found that Grace's quiet title action accrued in 1984 when she discovered the errors. The court further determined that even if Grace's cause of action had accrued on August 15, 1979, Harold's representations over the years that he would sign a correction mineral deed effectively tolled the statute of limitations with respect to the quiet title action. The court also determined that Grace's "inexplicable failure" to press her claim in light of Harold's inaction "constitute[d] laches on her part such as to make it manifestly unjust to quiet title in her as of the date of the decree of dissolution." The court, however, made no finding regarding prejudice to Harold as a result of Grace's delay in filing her action. Based on its findings, the court issued an order quieting title in Grace's name to an undivided one-half interest in the mineral interests omitted or misidentified in the 1979 mineral deed. The court quieted title as of February 6, 1990, the date Grace filed her original petition.

Grace and Harold both filed motions for new trial which were denied by the district court. Grace appealed and Harold cross-appealed the decision. This court dismissed the appeal and cross-appeal after concluding that the decree filed June 7, 1993, was not a final order because the accounting portion of the action was still pending before the district court. *Olsen v. Olsen*, 248 Neb. 393, 534 N.W.2d 762 (1995).

Harold died in December 1995, and Cherie, his widow, as personal representative of his estate, was substituted as the defendant in the proceedings in the district court. However, for convenience, we will henceforward refer to Cherie, in her capacity as defendant, appellee, and cross-appellant in the instant case, as "Harold."

Trial on the accounting action was held on February 7, 2000. The district court issued an order dated June 23, 2000, in which it noted that the parties had stipulated to an accounting of proceeds received since February 6, 1990. The court approved the stipulation and noted the existence of an issue regarding the

check for \$28,795.77 that Harold had received from Unocal in March 1990. The court concluded that because the check represented proceeds which had accrued prior to February 6, the payment was correctly made to Harold and should not be included in the accounting sought by Grace.

Although the order dated June 23, 2000, was file stamped on June 27, the district court clerk failed to notify counsel for Grace and Harold of the filing. The parties were not notified until an identical entry of judgment was filed on August 18. Grace filed a notice of appeal on September 13. On January 24, 2001, this court issued an order to show cause why the appeal should not be dismissed for lack of jurisdiction for failure to timely appeal the judgment entered June 27, 2000, or to show cause why the remedy was not in the district court under its authority to vacate a judgment due to mistake, neglect, or omission by the district court clerk. On February 6, 2001, the parties filed a joint motion for this court to dismiss the appeal on the ground that the parties intended to ask the district court to vacate its judgment due to error by the clerk. We dismissed the appeal on February 22.

The parties subsequently moved the district court to vacate the orders filed June 27 and August 18, 2000. On October 16, 2001, the court entered an order vacating the orders filed June 27 and August 18, 2000. On that same day, the court filed an order disposing of the accounting action which was effectively identical to the orders it vacated. Grace now appeals from the order filed October 16, 2001, and Harold cross-appeals.

ASSIGNMENTS OF ERROR

Grace asserts that the district court erred in finding her guilty of laches and therefore quieting title as of February 6, 1990, rather than August 15, 1979. Grace makes additional assignments of error which, considering our disposition of this case, we need not consider.

In his cross-appeal, Harold asserts that the district court erred in failing to find that Grace's action to quiet title was completely barred by either the statute of limitations or laches.

STANDARDS OF REVIEW

[1,2] A quiet title action sounds in equity. *Burk v. Demaray*, 264 Neb. 257, 646 N.W.2d 635 (2002). In an appeal of an

equitable action, an appellate court tries factual questions de novo on the record, provided that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Id.*

ANALYSIS

Cross-Appeal: Statute of Limitations.

Harold argues in his cross-appeal that the statute of limitations barred Grace's action to quiet title or, in the alternative, that the district court's finding of laches should have barred all relief to Grace. We consider Harold's arguments regarding the statute of limitations first because if Grace's action was barred by the statute of limitations, then the other issues in this appeal would become moot. We treat the issues related to laches in the analysis of Grace's appeal.

[3] Harold asserts that Grace's action to quiet title was barred by the statute of limitations. We determine that Harold is equitably estopped from asserting a statute of limitations defense. Harold notes that Neb. Rev. Stat. § 25-202 (Reissue 1989) provides in part, "An action for the recovery of the title or possession of lands, tenements, or hereditaments, or for the foreclosure of mortgages thereon, can only be brought within ten years after the cause of action shall have accrued." This court has held that § 25-202 is applicable to an action to quiet title to an interest in real estate. *Nemaha Nat. Resources Dist. v. Neeman*, 210 Neb. 442, 454, 315 N.W.2d 619, 626 (1982) ("a suit to quiet title is an action for the recovery of real property within the statute of limitations applying to such an action"). Harold argues that Grace's action to quiet title accrued in February 1979, when the decree of dissolution was entered, or on August 15, 1979, when the erroneous mineral deed was executed, and that therefore, Grace's petition filed February 6, 1990, was filed outside the 10-year period of limitations under § 25-202.

In its June 7, 1993, decree, the district court determined that the statute of limitations with respect to the quiet title action did not accrue until 1984, when Grace discovered the errors in the 1979 mineral deed. The court further stated that even if the action

had accrued in 1979, Harold's representations over the years that he would sign the correction mineral deed effectively tolled the statute of limitations.

Grace's action to quiet title arose from the fact that the 1979 mineral deed contained certain errors and omissions. Therefore, her action accrued on August 15, 1979, when the erroneous mineral deed was executed. Under the 10-year statute of limitations in § 25-202, the limitations period would normally have run on August 15, 1989. However, we conclude that because of his representations, promises, and conduct, Harold was equitably estopped from asserting the statute of limitations as a defense.

[4] The elements of equitable estoppel are, as to the party estopped: (1) conduct which amounts to a false representation or concealment of material facts, or at least which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. As to the other party, the elements are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his or her injury, detriment, or prejudice. *Manker v. Manker*, 263 Neb. 944, 644 N.W.2d 522 (2002). The first prong of this test is met when one lulls his or her adversary into a false sense of security, thereby causing that person to subject his or her claim to the bar of the statute of limitations, and then pleads the very delay caused by his or her conduct as a defense to the action when it is filed. *Id.*

[5,6] Equitable estoppel is not limited to circumstances of fraud. The doctrine of equitable estoppel may be applied to prevent an inequitable resort to a statute of limitations as well, and a defendant may, by his or her representations, promises, or conduct, be so estopped where the other elements of estoppel are present. *Id.* Equity is determined on a case-by-case basis when justice and fairness so require. Equity may be used under appropriate

circumstances, and equitable principles may prevent one from asserting a particular defense when it would be unfair or unjust to allow that person to do so. *Id.*

In the present case, the district court determined that even if Grace's cause of action had accrued on August 15, 1979, Harold's promises over the years that he would sign the correction mineral deed effectively tolled the statute of limitations with respect to the quiet title action. Although the court speaks in terms of a "tolling" of the statute of limitations, the facts of this case support a conclusion that Harold was equitably estopped from asserting the statute of limitations as a defense to Grace's action to quiet title.

[7] A claim of equitable estoppel rests in equity, and in an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the trial court. *Id.* The record in this case indicates that after discovering the errors in the 1979 mineral deed in 1984, Grace had a correction mineral deed prepared. In 1985, Grace's attorney wrote a letter requesting Harold to execute the correction mineral deed. The attorney testified that some time after he sent the letter, Harold met with the attorney and advised him that he was not going to sign the correction mineral deed. Grace testified, however, that over the next several years, Harold repeatedly represented to her that he would execute the correction mineral deed after his attorney had reviewed it, and that Harold never indicated to her that he did not intend to sign that deed. Grace understood that Harold would sign the deed.

Grace testified that in 1988, Harold asked her to assist him with his participation in a federal farm program. Grace told him that she would cooperate only if he executed the correction mineral deed. Harold promised her that he would sign it, and Grace assisted him by loaning him \$60,000. We note that Harold's promise in 1988 occurred within the 10-year limitations period under § 25-202 for Grace's quiet title action, which accrued in 1979.

Grace testified that she did not have much contact with Harold in 1989, but that in early 1990, she again asked him whether he was going to sign the correction mineral deed, and that he told her that he had not yet done it but was going to do

so. Grace filed her first petition in this case shortly thereafter, on February 6, 1990.

The evidence shows that in 1989, Harold and his attorney corresponded with Unocal regarding royalties from certain mineral interests that were misidentified in the 1979 deed. In a letter dated August 18, 1989, Harold's attorney stated to Unocal that the statute of limitations had run on any action Grace might bring to make a claim to the mineral interest. As noted above, Grace's cause of action accrued when the erroneous mineral deed was executed on August 15, 1979, and therefore, the 10-year limitations period under § 25-202 ended on August 15, 1989.

We determine that although Harold initially told Grace's attorney that he was not going to sign the correction mineral deed, he subsequently and repeatedly represented to Grace that he would sign the deed and never told her that he did not so intend. Grace understood that Harold would sign the deed. Furthermore, Harold reiterated his promise to sign in 1988 in order to induce Grace to assist him with his participation in a federal farm program. Harold's correspondence with Unocal in 1989 indicates that Harold was aware of the statute of limitations on Grace's claim. The evidence indicates that Harold was leading Grace to believe that he planned to sign the correction mineral deed in order to influence her not to file an action prior to the running of the statute of limitations, all the while knowing that he did not intend to sign the deed.

Harold's representations, promises, and conduct were such as to lull Grace into a false sense of security, thereby causing Grace to subject her claim to the bar of the statute of limitations. See *Manker v. Manker*, 263 Neb. 944, 644 N.W.2d 522 (2002). Equitable estoppel should be applied to prevent Harold from asserting the statute of limitations as a defense, because it would be unfair to allow Harold to raise that defense when his own promises and representations led to Grace's delay in filing her action.

Because we determine that equitable estoppel is appropriate in this case, Harold cannot assert the statute of limitations as a bar, and we, therefore, conclude that Grace's action will not be barred by the statute of limitations. Accordingly, albeit for different reasons, the district court did not err in rejecting Harold's

claim that Grace's case should be dismissed as time barred. Harold's assignment of error on cross-appeal with regard to the statute of limitations is therefore without merit.

Appeal: Laches.

Grace argues that the district court erred in finding her guilty of laches in bringing her action to quiet title. In his cross-appeal, Harold argues that the court erred in failing to find that laches completely barred Grace's action. Based on its finding of laches, the court ordered that title be quieted as of February 6, 1990, the date Grace filed her petition, rather than as of the date of the dissolution of the parties' marriage in February 1979 or the date of the erroneous mineral deed in August 1979. Pursuant to its ruling, the court determined in the accounting requested by Grace that Grace was not entitled to a share of the mineral interest proceeds accrued prior to February 6, 1990, including the Unocal proceeds. We conclude that Harold is precluded from asserting laches as a defense due to unclean hands and, therefore, that the district court erred in finding laches. Because the court erred in this finding, the court also erred in concluding that title should be quieted as of February 6, 1990, rather than August 15, 1979, and that Grace was not entitled to proceeds accrued prior to February 6, 1990.

[8] Laches is an equitable defense, and in order to benefit from the operation of laches, a party must come to the court with clean hands. Under the doctrine of unclean hands, a person who comes into a court of equity to obtain relief cannot do so if he or she has acted inequitably, unfairly, or dishonestly as to the controversy in issue. *Manker v. Manker, supra*.

In the present case, Harold pled laches as an affirmative defense to Grace's claims. As discussed above, Harold's promises and representations were such that Harold was equitably estopped from asserting the statute of limitations as a defense. Under the same reasoning, because of his actions, Harold has unclean hands with respect to Grace's delay in filing her petition in this case, and pursuant to the doctrine of unclean hands, Harold is prevented from asserting laches as a defense. We therefore conclude that the district court erred in finding Grace guilty of laches.

Because laches was not available to Harold as a defense in this case, the district court erred in finding laches and in quieting title as of February 6, 1990. Instead, the court should have quieted title as of August 15, 1979, the date the erroneous mineral deed was executed. The court further erred in the accounting when it concluded that Grace was not entitled to a share of the proceeds, including the Unocal proceeds, which accrued prior to February 6, 1990. We therefore conclude that the portion of the court's order finding laches and its associated accounting must be reversed and the cause remanded to the district court to enter an order quieting title as of August 15, 1979, and to order an accounting for proceeds since that date.

CONCLUSION

We conclude that Harold is equitably estopped from asserting the statute of limitations and is barred by unclean hands from asserting laches. In view of the foregoing, we conclude that the district court did not err in finding that Grace's action to quiet title was not barred by the statute of limitations and that title to Grace's share of the disputed property should be quieted in Grace. We also conclude, however, that the court erred in finding Grace guilty of laches. We therefore affirm that portion of the order in which the court held in favor of Grace on the quiet title action, but we reverse that portion of the order in which the court found Grace guilty of laches and erroneously quieted title as of February 6, 1990, rather than August 15, 1979. The accounting based on these errors must also be reversed. We remand this cause to the district court with instructions to amend its order to provide that title to Grace's share of the disputed property be quieted in Grace as of August 15, 1979, and to order an accounting for proceeds earned since that date.

AFFIRMED IN PART, AND IN PART REVERSED
AND REMANDED WITH DIRECTIONS.

ALEGENT HEALTH, A PARTNERSHIP, APPELLEE, V.
AMERICAN FAMILY INSURANCE, INC., APPELLANT.
656 N.W.2d 906

Filed February 21, 2003. No. S-01-1366.

1. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
2. **Health Care Providers: Liens.** A hospital lien attaches upon admission of a patient to the hospital for treatment.
3. **Health Care Providers: Liens: Tort-feasors: Insurance.** Upon perfection of a lien by a hospital, a duty arises on the part of the tort-feasor's insurer not to impair the hospital's rights under that lien. If such an insurer settles directly with the injured party despite the existence of a perfected hospital lien, it has breached that duty and is liable directly to the hospital.

Appeal from the District Court for Douglas County: GARY B.
RANDALL, Judge. Affirmed.

Jeffrey A. Silver for appellant.

Kirk E. Brumbaugh for appellee.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, McCORMACK, and
MILLER-LERMAN, JJ.

WRIGHT, J.

NATURE OF CASE

American Family Insurance, Inc. (American Family), appeals from a judgment of the Douglas County District Court, which found that a hospital lien filed by Alegent Health (Alegent) was valid and enforceable against American Family. Alegent was awarded \$10,120.32 in damages.

SCOPE OF REVIEW

[1] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Eyl v. Ciba-Geigy Corp.*, 264 Neb. 582, 650 N.W.2d 744 (2002).

FACTS

On May 22, 1997, Alegent notified American Family and James Coran that Alegent claimed a statutory hospital lien for

expenses totaling \$10,120.32 which were incurred in the treatment of Coran. Coran's injuries resulted from an automobile collision on September 24, 1996, and he was treated at Alegent from April 1 through November 6, 1997. The other party involved in the collision was insured by American Family. An amended notice of a hospital lien was sent to Coran, his attorney, and American Family on November 20.

Patty Vana, patient account representative for Alegent, stated in an affidavit that on November 20, 1997, she was told by Kimberly Nash at American Family that the company was negotiating with Coran and his attorney and that Nash had informed the attorney of the hospital lien. The attorney indicated to Nash that he would honor Alegent's lien.

Vana discussed Alegent's lien with Coran's attorney on December 8, 1997. Vana did not receive any further information from the attorney concerning settlement of Coran's claim.

Subsequent to perfection of the lien, American Family settled Coran's claim through his counsel. A check payable to Coran and his attorney for the policy limit of \$100,000 was issued by American Family, and it was cashed on December 24, 1997. American Family did not include Alegent on the check because it had been assured by Coran's attorney that he would "work out" all liens.

On February 9, 1998, Coran's attorney told Vana that Alegent needed to bill Medicaid because Coran's bills would exceed the limits of American Family's policy. The attorney also indicated that Coran might file for bankruptcy. On that same day, Nash told Vana that American Family had settled the claim on November 25, 1997, and paid the policy limits to Coran and his attorney.

On February 11, 1998, Alegent contacted the Nebraska Department of Health and Human Services (DHHS), and DHHS indicated that pursuant to 471 Neb. Admin. Code, ch. 3, § 004.01 (1982), Medicaid would not pay medical expenses unless all funds from a settlement had been exhausted, and that Medicaid was the payor of last resort. Alegent was also told that Coran did not become eligible for Medicaid until November 1, 1996, and that, therefore, his original medical bills from the accident were not Medicaid eligible. In addition, Coran was required as a condition of eligibility to disclose a pending

third-party liability situation and to cooperate in securing payment of related bills. Neither Coran nor his attorney furnished DHHS with such information.

On April 15, 1998, Alegent filed a petition alleging that American Family had not protected Alegent's lien because American Family did not note the existence of the lien on the check which disbursed the insurance proceeds. Alegent claimed that Coran received the proceeds and subsequently filed for bankruptcy relief under chapter 7 of the federal bankruptcy statutes. Alegent asserted that as a result, any remedy it had against Coran had been legally foreclosed, and that Alegent was therefore entitled to enforce its hospital lien against American Family.

In its answer, American Family claimed that Coran was a "Medicare/Medicaid eligible beneficiary" and that all the services claimed by Alegent were Medicare/Medicaid-covered services. American Family asserted that the lien was in violation of federal law, 42 C.F.R. § 411.54(c)(2)(i) (1997), which provides that a hospital may not bill a liability insurer nor place a lien against the beneficiary's liability insurance settlement for Medicare-covered services. American Family also claimed that Alegent could not file a lien to secure a debt which did not exist because the debt had been discharged in bankruptcy.

Alegent filed a motion for relief from the automatic stay in the U.S. Bankruptcy Court for the District of Nebraska. On June 3, 1998, the bankruptcy court entered an order granting relief to the extent necessary for Alegent to determine the validity of its lien on the proceeds through a declaratory judgment or other action. The order noted that counsel for Coran had retained \$25,000 of the \$100,000 settlement in his trust account and that Coran deposited \$43,548.61 in a "'special account.'"

On June 9, 1998, the bankruptcy court vacated a portion of its earlier order which had retained jurisdiction of the proceeds in the trust account. The court stated:

This is a fight between a debtor who claims certain assets as exempt and a creditor who claims a lien on those assets. The trustee has abandoned any interest in the assets The estate will not benefit no matter what the state court determination is. Therefore, there is no legal reason for this court to entertain continuing jurisdiction.

Both parties filed motions for summary judgment in the district court. At the summary judgment hearing, the parties stipulated that Coran had been granted a discharge in bankruptcy, that the enforceability of Alegent's lien rested on a determination of whether the lien on the proceeds of the settlement made the hospital a secured creditor, and that Coran's attorney had paid proceeds from the settlement to the clerk of the district court for Douglas County.

On November 14, 2001, the district court entered an order finding that Alegent had a valid and enforceable lien in the sum of \$10,120.32.

ASSIGNMENTS OF ERROR

American Family assigns as error that the district court erred in finding that a hospital lien can be enforced when the underlying debt has been discharged in bankruptcy. American Family also asserts that the filing of a hospital lien for "medicare/medicaid eligible charges" violates federal law, specifically 42 C.F.R. § 411.54(c)(2)(i).

ANALYSIS

American Family argues that when an underlying debt has been discharged in bankruptcy, there are no proceeds available to which a perfected hospital lien can attach. It relies on the fact that Coran included Alegent's lien on \$10,120.32 in Schedule F of his bankruptcy petition. Schedule F lists those creditors holding unsecured nonpriority claims. Alegent was among the parties who were served with notice of Coran's discharge in bankruptcy. American Family claims that since Alegent sought and obtained relief in the bankruptcy court but did not object to the discharge of Coran's debt, Alegent's lien is void as a matter of law.

Alegent asserts that it did not seek to collect a debt against a patient who had filed and been discharged in bankruptcy; rather, it sought to enforce a hospital lien against American Family. Alegent argues that American Family was on notice that Alegent had a lien but failed to protect the lien by paying the settlement proceeds directly to Coran and his attorney. Alegent claims that its hospital lien remained valid despite the bankruptcy filing.

Neb. Rev. Stat. § 52-401 (Reissue 1998), which governs hospital liens, states:

Whenever any person employs a . . . hospital to perform professional service or services of any nature, in the treatment of or in connection with an injury, and such injured person claims damages from the party causing the injury, such . . . hospital . . . shall have a lien upon any sum awarded the injured person in judgment or obtained by settlement or compromise on the amount due for the usual and customary charges of such . . . hospital applicable at the times services are performed

In order to prosecute such lien, it shall be necessary for such . . . hospital to serve a written notice upon the person or corporation from whom damages are claimed that such . . . hospital claims a lien for such services and stating the amount due and the nature of such services

[2] The parties here do not question the attachment, perfection, or amount of the lien. In *West Neb. Gen. Hosp. v. Farmers Ins. Exch.*, 239 Neb. 281, 475 N.W.2d 901 (1991), this court held that a hospital lien attaches upon admission of the patient to the hospital for treatment. The lien in this case attached when Coran was admitted to Alegent for medical treatment. American Family's refusal to honor the lien is based on its assertion that no proceeds are available for the perfected lien to attach to, since the underlying debt has been discharged in bankruptcy. This argument has not been adopted by other courts.

In a case with similar facts, *Filker v. Honda Motor Co., Ltd.*, 87 Ill. App. 3d 865, 409 N.E.2d 495, 42 Ill. Dec. 880 (1980), the court held that a hospital was entitled to enforce its lien subsequent to a bankruptcy because the hospital's security interest was not affected by the bankruptcy. " 'A discharge in bankruptcy does not affect, release, or discharge any securities or valid liens on property of the bankrupt which were in existence prior to the petition or adjudication in bankruptcy.' " *Id.* at 867, 409 N.E.2d at 496, 42 Ill. Dec. at 881. The court held that the classification of a creditor on a bankruptcy plaintiff's schedule of creditors is not conclusive as to the creditor's status.

In *Filker*, the plaintiff received medical treatment following a motorcycle accident and was discharged from the hospital with unpaid bills in excess of \$25,000. The hospital filed and perfected a hospital lien under state law. The plaintiff filed a personal injury

action against the motorcycle company and subsequently filed for bankruptcy. His debts were discharged in bankruptcy, and he then recovered a judgment of more than \$186,000 in the personal injury action. The lower court allowed the hospital's petition to enforce its lien, and the plaintiff appealed.

The plaintiff in *Filker* asserted that the hospital was an unsecured creditor whose debt was discharged in bankruptcy, barring its action to recover on the debt. The appellate court disagreed and held that perfection of the lien made the debt a secured one under state law. The court stated that a discharge in bankruptcy is personal to the bankrupt and " 'does not act as a release of liens or security interests in property owned by him. Accordingly, a creditor holding a security interest need not proceed in bankruptcy court but may rely on his security and enforce his rights against it in any court of competent jurisdiction.' " *Filker*, 87 Ill. App. 3d at 867, 409 N.E.2d at 496, 42 Ill. Dec. at 881, quoting *Avco Finance Co. v. Erickson*, 132 Ill. App. 2d 868, 270 N.E.2d 111 (1971).

Several bankruptcy courts have also upheld the validity of hospital liens. In *In re Innis*, 181 B.R. 548 (N.D. Okla. 1995), a hospital executed a lien for hospital charges incurred by an accident victim in the amount of \$223,345.31. The insurer settled the victim's claim for \$40,000. The victim and his attorney both knew of the hospital lien and that it had not been released or satisfied before the victim filed for bankruptcy relief. On Schedule C, the victim listed his interest in personal injury proceeds as exempt. The hospital did not file an objection to the exemption, but filed a complaint in bankruptcy court.

The *In re Innis* court found that under federal law, the personal injury settlement proceeds, even though declared exempt, remained liable for the hospital debt to the extent it was secured by the hospital lien. The court also reviewed state law and found that under both laws, "a hospital lien . . . is enforceable against personal injury proceeds under \$50,000.00, notwithstanding exemption of such proceeds under [federal bankruptcy law]." *Id.* at 551.

The U.S. Bankruptcy Court for the District of North Dakota has also held that a hospital lien which was in effect against a debtor before he filed for bankruptcy relief was valid. See *In re Dueis*, 130 B.R. 83 (D.N.D. 1991). The lien was unaffected by

the bankruptcy filing, and the court found that the hospital could pursue foreclosure of its lien under state law.

[3] The situation presented in the case at bar has not previously been considered by this court. However, in *West Neb. Gen. Hosp. v. Farmers Ins. Exch.*, 239 Neb. 281, 287, 475 N.W.2d 901, 907 (1991), we held:

Upon perfection of a lien by a hospital, a duty arises on the part of the tort-feasor's insurer not to impair the hospital's rights under that lien. If such an insurer settles directly with the injured party despite the existence of a perfected hospital lien, it has breached that duty and is liable directly to the hospital.

The U.S. District Court for the District of Nebraska has adopted the *West Neb. Gen. Hosp.* holding. See *Bryan Memorial v. Allied Property and Cas. Ins.*, 163 F. Supp. 2d 1059 (D. Neb. 2001). The federal court noted that in such a case, the hospital needs to prove only that "it had a perfected hospital lien under Neb.Rev.Stat. § 52-401, the amount of that lien, and that [the insurer] impaired that lien." *Bryan Memorial*, 163 F. Supp. 2d at 1066.

No question has been raised concerning whether Alegent's lien was properly perfected or as to the amount of the lien. It has been demonstrated that American Family impaired the lien by settling directly with Coran via his attorney and by issuing the settlement check payable to them, without including Alegent.

American Family's reliance on *Satsky v. U.S.*, 993 F. Supp. 1027 (S.D. Tex. 1998), is misplaced. In *Satsky*, a hospital sought to recover for expenses incurred in treating an accident victim. The patient had an insurance policy which served as a prepaid health care plan. The hospital had agreed to accept the compensation set forth in the plan as payment in full for all hospital services provided to those insured under the plan. The hospital collected \$42,300 from the insurer for services rendered and then filed a hospital lien for an additional \$76,729.05, the amount by which the charges for treatment exceeded the amount paid by the insurer under the plan.

The federal district court found that the lien was barred because the hospital had agreed to accept payment as provided in the plan. American Family suggests that *Satsky* is analogous

because there was no debt and therefore no lien. The *Satsky* court had noted the “intrinsic reality that without a debt, a lien is purely illusory.” *Id.* at 1030. However, American Family’s reasoning is incorrect because the facts in *Satsky* are dissimilar. The hospital in *Satsky* had agreed to accept partial payment under the terms of an agreement with the insurance company and, therefore, had received all the payments to which it was entitled.

In the case at bar, Alegent has received nothing in return for the costs it incurred while treating Coran. There is no evidence of an agreement between American Family and Alegent stating that Alegent would accept an amount less than the actual charges. The hospital’s lien attached prior to the bankruptcy filing and was unaffected by Coran’s discharge in bankruptcy. Since American Family settled directly with Coran despite the existence of Alegent’s perfected hospital lien, American Family breached its duty to Alegent not to impair Alegent’s rights under its lien, and American Family is directly liable to Alegent.

American Family’s second argument suggests that federal law prohibits the imposition of a hospital lien against a beneficiary’s liability insurance settlement for Medicare-covered services. This assignment of error is without merit.

There is no evidence that Coran was eligible for Medicare, which is a program with a different purpose and different standards than Medicaid. See *Evanston Hosp. v. Hauck*, No. 92 C 732, 1992 WL 205900 (N.D. Ill. 1992), *affirmed* 1 F.3d 540 (7th Cir. 1993), *cert. denied* 510 U.S. 1091, 114 S. Ct. 921, 127 L. Ed. 2d 215 (1994). According to DHHS, Coran became eligible for Medicaid on November 1, 1996, and he was never eligible for Medicare during the relevant time period.

American Family cites to 42 C.F.R. § 411.54 for the proposition that a health care provider “[m]ay not bill the liability insurer nor place a lien against the beneficiary’s liability insurance settlement for Medicare covered services.” American Family asks us to rely on the affidavit of Coran’s attorney, in which he stated that Coran was a “Medicaid eligible beneficiary and all the services upon which Alegent makes claim were Medicaid covered services.” The attorney states that it was his judgment that the federal regulation was dispositive of Alegent’s claim. In its brief, American Family states that one of Coran’s medical bills from

another provider was paid pursuant to the “Medicare DRG’s.” See brief for appellant at 8. In the attorney’s affidavit, he stated that the bill reflected Medicaid adjustments. While American Family may have relied upon Coran’s attorney’s statements, such statements have no bearing on our determination of this issue.

Apparently, American Family considers the Medicare and Medicaid programs to be interchangeable. American Family asks this court to apply the federal regulation concerning Medicare to “Medicare/Medicaid.” Brief for appellant at 9. However, the regulation refers only to Medicare. As the court noted in *Evanston Hosp.*, the two programs are separate and governed by different statutes. “Federal Medicare enactments do not provide any mandates for state Medicaid practices. Plaintiff’s attempt to treat a Medicare provision as part of the Medicaid statute is not appropriate.” *Evanston Hosp.*, 1992 WL 205900 at *2.

Medicare and Medicaid are separate and distinct programs, and whether Coran was eligible for either has no effect on Alegent’s lien, which was enforceable. Alegent did not violate federal law in attempting to obtain payment for its services to Coran.

When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Eyl v. Ciba-Geigy Corp.*, 264 Neb. 582, 650 N.W.2d 744 (2002). We find that the district court’s conclusion was correct.

CONCLUSION

American Family settled directly with Coran despite the existence of Alegent’s perfected hospital lien. Thus, American Family is directly liable to Alegent for American Family’s breach of its duty not to impair Alegent’s rights under the lien. The record does not support a finding that Coran was eligible for Medicare or that Alegent violated federal law by attempting to recover its expenses through the filing of a lien.

The district court correctly found that Alegent had a valid and enforceable lien in the amount of \$10,120.32. The judgment is affirmed.

AFFIRMED.

HENDRY, C.J., participating on briefs.

LAYNE L. HASS, APPELLANT, v. BEVERLY NETH, DIRECTOR,
NEBRASKA DEPARTMENT OF MOTOR VEHICLES, APPELLEE.
657 N.W.2d 11

Filed February 21, 2003. No. S-02-158.

1. **Appeal and Error.** A claimed prejudicial error must not only be assigned, but must also be discussed in the brief of the asserting party, and an appellate court will not consider assignments of error which are not discussed in the brief.
2. **Administrative Law: Final Orders: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
3. **Administrative Law: Judgments: Appeal and Error.** When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
4. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below.
5. **Judgments: Appeal and Error.** Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.
6. **Due Process: Notice.** Procedural due process limits the ability of the government to deprive people of interests which constitute “liberty” or “property” interests within the meaning of the Due Process Clause and requires that parties deprived of such interests be provided adequate notice and an opportunity to be heard.
7. **Constitutional Law: Due Process.** The due process requirements of Nebraska’s Constitution are similar to those of the federal Constitution.
8. **Due Process.** The first step in a due process analysis is to identify a property or liberty interest entitled to due process protections.
9. **Motor Vehicles: Licenses and Permits: Revocation: Due Process.** Suspension of issued motor vehicle operators’ licenses involves state action that adjudicates important property interests of the licensees. In such cases, the licenses are not to be taken away without that procedural due process required by the 14th Amendment.
10. **Due Process.** Once it is determined that due process applies, the question remains what process is due.
11. **Due Process: Words and Phrases.** Though the required procedures may vary according to the interests at stake in a particular context, the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.
12. **Motor Vehicles: Licenses and Permits: Due Process.** Before a state may deprive a motorist of his or her driver’s license, that state must provide a forum for the determination of the question and a meaningful hearing appropriate to the nature of the case.
13. **Administrative Law: Due Process: Notice: Evidence.** In proceedings before an administrative agency or tribunal, procedural due process requires notice, identification of the accuser, factual basis for the accusation, reasonable time and

opportunity to present evidence concerning the accusation, and a hearing before an impartial board.

14. **Due Process.** There are a number of factors to be considered in resolving an inquiry into the specific dictates of due process: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.
15. **Motor Vehicles: Licenses and Permits: Due Process.** A driver's interest in his or her driving privileges is significant in today's society, as its loss may entail economic hardship and personal inconvenience.
16. **Drunk Driving: Public Health and Welfare.** There is no doubt of a substantial governmental interest in protecting public health and safety by removing drunken drivers from the highways.
17. **Constitutional Law: Statutes: Proof.** The burden of establishing the unconstitutionality of a statute is on the one attacking its validity.
18. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.
19. **Constitutional Law: Statutes: Proof.** The unconstitutionality of a statute must be clearly demonstrated before a court can declare the statute unconstitutional.
20. **Equal Protection: Statutes: Presumptions.** Where a statute is challenged under the Equal Protection Clause, the general rule is that legislation is presumed to be valid.
21. **Equal Protection: Statutes.** In an equal protection challenge, when a fundamental right or suspect classification is not involved in legislation, the legislative act is a valid exercise of police power if the act is rationally related to a legitimate governmental purpose.
22. **Equal Protection: Proof.** The initial inquiry in an equal protection analysis focuses on whether the challenger is similarly situated to another group for the purpose of the challenged governmental action. Absent this threshold showing, one lacks a viable equal protection claim.
23. **Constitutional Law: Equal Protection.** The rational relationship standard, as the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause of the 14th Amendment to the U.S. Constitution, is offended only if a classification rests on grounds which are wholly irrelevant to the achievement of the government's objectives.
24. **Administrative Law: Appeal and Error.** Generally, in an appeal under the Administrative Procedure Act, an appellate court will not consider an issue on appeal that was not presented to or passed upon by the administrative agency.
25. **Trial: Waiver: Appeal and Error.** A litigant's failure to make a timely objection waives the right to assert prejudicial error on appeal.
26. **Trial: Appeal and Error.** One cannot silently tolerate error, gamble on a favorable result, and then complain that one guessed wrong.
27. **Public Officers and Employees.** Whether a notary is disqualified, by virtue of a relationship or interest, is a factual question to be determined from the circumstances of each particular case.

28. _____. A notary has a disqualifying interest in a proceeding if the notary has a financial or beneficial interest in the transaction other than receipt of the ordinary notarial fee, or is named, individually, as a party to the transaction.
29. **Affidavits: Words and Phrases.** An affidavit is a written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation.
30. **Affidavits: Proof.** An affidavit must bear on its face, by the certificate of the officer before whom it is taken, evidence that it was duly sworn to by the party making the same.
31. **Affidavits: Proof: Public Officers and Employees.** An affidavit does not require a notary to confirm the truth of the facts stated in the affidavit; rather, the certificate confirms only that the affiant appeared before the notary, attested to the truth of his or her statements, and signed the affidavit.
32. **Actions: Oaths and Affirmations.** Where there is no imputation or charge of improper conduct or bad faith or undue advantage, the mere fact that an oath was taken before an interested party will not vitiate the ceremony or render it void, if otherwise it is free from objection or criticism.

Appeal from the District Court for Saunders County: MARY C. GILBRIDE, Judge. Affirmed.

Jeffrey H. Bush for appellant.

Don Stenberg, Attorney General, Hobert B. Rupe, and Ingolf D. Maurstad, Senior Certified Law Student, for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, McCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

NATURE OF CASE

Layne L. Hass appeals from the judgment of the district court affirming a 1-year driver's license revocation imposed by the Department of Motor Vehicles (the Department). The primary question presented in this appeal is whether the state or federal Constitution required that Hass be allowed, at the administrative license revocation (ALR) hearing, to challenge the lawfulness of the traffic stop that led to his arrest.

BACKGROUND

Hass was stopped by the Nebraska State Patrol on the afternoon of July 22, 2001, based on erratic driving and speeding.

Rex Kindall, a trooper with the State Patrol, testified that he observed Hass' vehicle swerve onto the shoulder of the county road on which it was westbound. Kindall followed the vehicle and observed it weaving onto the shoulder and clocked the vehicle by radar traveling 59 miles per hour in a 55-mile-per-hour zone. Kindall then turned on his emergency lights and stopped the vehicle.

Kindall testified that it took Hass a little while to respond to Kindall's emergency lights and that when Hass did stop, he had difficulty getting his driver's license out of his wallet. Kindall testified that he could smell an odor of alcohol at the window of the vehicle as he spoke with Hass. Kindall asked Hass to step out of the vehicle and sit in the patrol car. Kindall issued "paperwork" for driving on the shoulder and not having a current proof of insurance and, while speaking with Hass, could clearly smell the odor of alcohol from Hass' breath. Hass was not cited for speeding. Kindall asked Hass if he had been drinking, and Hass stated that he "could not lie and had consumed several drinks earlier." Kindall administered field sobriety tests; Hass' performance on the tests was erratic.

At that point, Kindall administered a breath test, which Hass failed. Hass was placed under arrest and taken to the jail in Wahoo, Nebraska, where Hass submitted to an Intoxilyzer test. The test indicated .156 grams of alcohol per 210 liters of breath. Kindall completed and issued a "Notice/Sworn Report/Temporary License" (sworn report). Kindall's signature on the sworn report was notarized by the technician who administered the Intoxilyzer test to Hass.

On July 25, 2001, Hass filed a petition for administrative hearing with the Department. A hearing was held on August 2. The hearing officer took "[n]otice" of titles 177 and 247 of the Nebraska Administrative Code, but a copy of title 177 was not entered into the record. Hass did not object at the hearing to the hearing officer's taking notice of title 177. The hearing officer recommended revocation of Hass' driver's license, and the director of the Department ordered Hass' driver's license to be revoked for 1 year. Hass appealed to the district court, which affirmed the action of the Department.

ASSIGNMENTS OF ERROR

Hass assigns, reordered, that the district court erred in (1) failing to find that the ALR scheme as applied in the case at bar deprives Hass of due process, (2) failing to find that the ALR scheme as applied in the case at bar deprives Hass of equal protection, (3) finding that adequate foundation had been presented before the agency for receipt of evidence concerning the issue of whether Hass was under the influence of an intoxicating liquor because title 177 of the Nebraska Administrative Code was never made a part of the agency's records, and (4) finding that the notary public was not disqualified from administering an oath in this case.

[1] Hass also assigns that the court erred in finding that there was probable cause to believe Hass was under the influence of alcohol to such an extent that he could not prudently operate a motor vehicle. However, this assignment of error is not argued in Hass' brief. A claimed prejudicial error must not only be assigned, but must also be discussed in the brief of the asserting party, and an appellate court will not consider assignments of error which are not discussed in the brief. *Nauenburg v. Lewis*, ante p. 89, 655 N.W.2d 19 (2003).

STANDARD OF REVIEW

[2,3] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *American Legion v. Nebraska Liquor Control Comm.*, ante p. 112, 655 N.W.2d 38 (2003). When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

[4,5] Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below. *In re Adoption of Baby Girl H.*, 262 Neb. 775, 635 N.W.2d 256 (2001), cert. denied sub nom. *Armour v. K.D.G.*, 535 U.S.

1035, 122 S. Ct. 1792, 152 L. Ed. 2d 651 (2002). Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court. *In re Application of Lincoln Electric System*, ante p. 70, 655 N.W.2d 363 (2003).

ANALYSIS

DUE PROCESS

[6,7] We first turn to Hass' contention that the ALR scheme violates due process. Procedural due process limits the ability of the government to deprive people of interests which constitute "liberty" or "property" interests within the meaning of the Due Process Clause and requires that parties deprived of such interests be provided adequate notice and an opportunity to be heard. *Marshall v. Wimes*, 261 Neb. 846, 626 N.W.2d 229 (2001). We note that the due process requirements of Nebraska's Constitution are similar to those of the federal Constitution. *Id.*

Hass argues that the ALR scheme violates due process because it does not permit him to challenge the Fourth Amendment constitutionality of the traffic stop at the administrative hearing. If a chemical test has disclosed the presence of alcohol in a concentration specified in Neb. Rev. Stat. § 60-6,196 (Cum. Supp. 2000), at the subsequent ALR hearing, the issues to be contested are limited to the following: (1) did the peace officer have probable cause to believe the person was operating or in the actual physical control of a motor vehicle in violation of § 60-6,196 or a city or village ordinance enacted pursuant to such section and (2) was the person operating or in the actual physical control of a motor vehicle while having an alcohol concentration in violation of § 60-6,196(1). See Neb. Rev. Stat. § 60-6,205(6)(c)(ii) (Reissue 1998). See, also, 247 Neb. Admin. Code, ch. 1, § 018 (2001).

However, while other issues such as the illegality of a stop are not contested at the ALR hearing, that does not mean that those issues are never raised. Pursuant to § 60-6,205(3), ALR proceedings are initiated when the driver is arrested pursuant to Neb. Rev. Stat. § 60-6,197 (Cum. Supp. 2000) and a chemical test discloses the presence of alcohol in a concentration specified in § 60-6,196.

A person whose operator's license is subject to revocation pursuant to subsection (3) of section 60-6,205 shall have all proceedings dismissed or his or her operator's license immediately reinstated without payment of the reinstatement fee upon receipt of suitable evidence by the director that (a) within the thirty-day period following the date of arrest the prosecuting attorney responsible for the matter declined to file a complaint alleging a violation of section 60-6,196, (b) the charge was dismissed, or (c) the defendant, at trial, was found not guilty of violating such section. Neb. Rev. Stat. § 60-6,206(4) (Reissue 1998). Consequently, any Fourth Amendment issue presented by the initial arrest may be raised in a subsequent criminal proceeding for driving under the influence (DUI). If there is no criminal prosecution, the criminal charge is dismissed or the defendant is acquitted, then either the ALR proceeding is dismissed or the driver's license is reinstated.

We note that Hass' argument implies that if the scope of the ALR hearing permitted the issue to be considered, the Fourth Amendment exclusionary rule would apply in an ALR proceeding. The majority of jurisdictions considering the issue have concluded that the rule barring admission in criminal trials of evidence derived from an unlawful stop, arrest, search, or seizure does not generally apply in license suspension proceedings. See, generally, Annot., 23 A.L.R.5th 108 (1994). The Fourth Amendment issue is not the same in Nebraska, however, by virtue of the statutory framework set forth above. Administrative revocation is contingent upon a successful prosecution of the driver in a criminal DUI proceeding. If the exclusionary rule, available in the criminal proceeding, prevents a conviction, then the exclusionary rule has also indirectly determined the outcome of the ALR proceeding. Compare *Brownsberger v. Dept. of Transp., MVD*, 460 N.W.2d 449 (Iowa 1990). Cf. *Young v. Neth*, 263 Neb. 20, 24, 637 N.W.2d 884, 888 (2002) (ALR must be based on "valid arrest"). The issue presented here is not based on the 4th Amendment; rather, the issue presented is whether 14th Amendment due process is violated by excluding 4th Amendment issues from the ALR proceeding and reserving those issues for the criminal DUI proceeding.

[8,9] The first step in a due process analysis is to identify a property or liberty interest entitled to due process protections. *Marshall v. Wimes*, 261 Neb. 846, 626 N.W.2d 229 (2001), citing *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 107 S. Ct. 1740, 95 L. Ed. 2d 239 (1987). Suspension of issued motor vehicle operators' licenses involves state action that adjudicates important property interests of the licensees. In such cases, the licenses are not to be taken away without that procedural due process required by the 14th Amendment. *Marshall, supra*, citing *Dixon v. Love*, 431 U.S. 105, 97 S. Ct. 1723, 52 L. Ed. 2d 172 (1977), and *Bell v. Burson*, 402 U.S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971).

[10-13] Once it is determined that due process applies, the question remains what process is due. *Marshall, supra*, citing *Brock, supra*. Though the required procedures may vary according to the interests at stake in a particular context, the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Id.* Thus, before a state may deprive a motorist of his or her driver's license, that state must provide a forum for the determination of the question and a meaningful hearing appropriate to the nature of the case. *Marshall, supra*. In proceedings before an administrative agency or tribunal, procedural due process requires notice, identification of the accuser, factual basis for the accusation, reasonable time and opportunity to present evidence concerning the accusation, and a hearing before an impartial board. *Id.*

[14] In *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), the U.S. Supreme Court set forth a number of factors to be considered in resolving an inquiry into the specific dictates of due process: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Marshall, supra*.

[15] The private interest that is at issue in this proceeding is the driver's interest in continued possession of a motor vehicle operator's license. We have previously held, in a *Mathews* analysis,

that a driver's interest in his or her driving privileges is significant in today's society, as its loss may entail economic hardship and personal inconvenience. See *Marshall, supra*.

The second prong of the *Mathews* analysis is the risk of an erroneous determination and the value, if any, of alternative procedures. In the present context, this would refer to the risk of the revocation of a driver's license despite the existence of a potentially valid Fourth Amendment challenge to the driver's arrest. Ultimately, the risk of erroneous deprivation is minimized by the fact that any legitimately dispositive Fourth Amendment argument will ultimately be validated in the criminal proceeding and result in the dismissal of the ALR proceeding or reinstatement of the driver's license. The value, if any, of determining a Fourth Amendment challenge at an ALR proceeding is limited to avoiding the temporary deprivation of the driver's license for the time period between a final judgment regarding the administrative revocation and the conclusion of the criminal DUI proceeding. See Neb. Rev. Stat. § 60-6,208 (Reissue 1998).

[16] The final factor of the balancing test set out in *Mathews* is the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. There is no doubt of the substantial governmental interest in protecting public health and safety by removing drunken drivers from the highways. *Marshall v. Wimes*, 261 Neb. 846, 626 N.W.2d 229 (2001). See, also, *Mackey v. Montrym*, 443 U.S. 1, 17, 99 S. Ct. 2612, 61 L. Ed. 2d 321 (1979) (states afforded "great leeway in adopting summary procedures to protect public health and safety" by removing drunken drivers from highways); *Dixon v. Love*, 431 U.S. 105, 114, 97 S. Ct. 1723, 52 L. Ed. 2d 172 (1977) (discussing "important public interest in safety on the roads and highways, and in the prompt removal of a safety hazard").

This court has previously discussed the "sound policy reasons for leaving a degree of separation between the civil ALR hearing and criminal DUI prosecutions." *State v. Young*, 249 Neb. 539, 544, 544 N.W.2d 808, 812 (1996).

Were this court to force the State to litigate thoroughly every element of DUI at an ALR hearing, such a holding

would seriously undermine the Legislature's goal of providing an informal and prompt review of the decision to suspend a driver's license. . . . ALR hearings would quickly evolve into full-blown trials at which the State must fully litigate every possible issue regarding a motorist's actions, thereby losing their effectiveness in removing potentially dangerous drivers from the Nebraska highways within 1 month of their offense.

(Citation omitted.) *Id.* at 544, 544 N.W.2d at 812-13.

[17-19] The burden of establishing the unconstitutionality of a statute is on the one attacking its validity. *State ex rel. Stenberg v. Omaha Expo. & Racing*, 263 Neb. 991, 644 N.W.2d 563 (2002). A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *Andrews v. Schram*, 252 Neb. 298, 562 N.W.2d 50 (1997). The unconstitutionality of a statute must be clearly demonstrated before a court can declare the statute unconstitutional. *Ponderosa Ridge LLC v. Banner County*, 250 Neb. 944, 554 N.W.2d 151 (1996). We conclude that Hass has not shown due process is violated because he is precluded from raising Fourth Amendment issues in an ALR proceeding.

Because persons who drive while under the influence of alcohol present a hazard to the health and safety of all persons using the highways, a procedure is needed for the swift and certain revocation of the operator's license of any person who has shown himself or herself to be a health and safety hazard

§ 60-6,205(1). This stated purpose is advanced by the provisions of § 60-6,205(6)(c), which limit the issues at an ALR hearing to (1) whether the arresting officer had probable cause to believe the person was operating or in the actual physical control of a motor vehicle while under the influence of drugs or alcohol and (2) whether the driver actually was operating or in the actual physical control of a motor vehicle while under the influence of drugs or alcohol—in other words, the issues most pertinent to determining whether or not a driver actually represents a hazard to the health and safety of those using the highways.

We conclude that the State's interest in quickly and efficiently removing drunken drivers from the highways provides sufficient

justification for deferring consideration of Fourth Amendment issues to a criminal DUI proceeding. The State's interest in public safety outweighs the temporary inconvenience of the driver who is deprived of his or her driving privileges during the time period between receipt of a final order from an ALR hearing and the resolution of a subsequent criminal DUI prosecution. The ALR hearing is sufficiently meaningful, pursuant to the balancing test of *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), to satisfy the requirements of constitutional due process. Hass' first assignment of error is without merit.

EQUAL PROTECTION

Hass next argues that the ALR scheme violates constitutional equal protection, in that one group (i.e., drivers subject to ALR proceedings) is treated differently (i.e., not permitted to raise Fourth Amendment issues) from a similarly situated group (i.e., drivers subject to criminal DUI prosecutions). For purposes of this analysis, we do not consider the equal protection requirements of the Nebraska Constitution to be any more demanding than the Equal Protection Clause of the U.S. Constitution. See *Mach v. County of Douglas*, 259 Neb. 787, 612 N.W.2d 237 (2000).

[20,21] Where a statute is challenged under the Equal Protection Clause, the general rule is that legislation is presumed to be valid. *Gas 'N Shop v. City of Kearney*, 248 Neb. 747, 539 N.W.2d 423 (1995). The burden of establishing the unconstitutionality of a statute is on the one attacking the statute's validity. *Bergan Mercy Health Sys. v. Haven*, 260 Neb. 846, 620 N.W.2d 339 (2000). In an equal protection challenge, when a fundamental right or suspect classification is not involved in legislation, the legislative act is a valid exercise of police power if the act is rationally related to a legitimate governmental purpose. See *State ex rel. Dept. of Health v. Jeffrey*, 247 Neb. 100, 525 N.W.2d 193 (1994). Hass concedes that no fundamental right or suspect classification is implicated by this case.

[22] The initial inquiry in an equal protection analysis focuses on whether the challenger is similarly situated to another group for the purpose of the challenged governmental action. Absent this threshold showing, one lacks a viable equal protection claim.

Benitez v. Rasmussen, 261 Neb. 806, 626 N.W.2d 209 (2001). Hass' argument fails to pass this initial inquiry, because, given the relationship between the ALR proceedings and criminal DUI prosecutions, there is no meaningful delineation between the "groups" identified by Hass. Any person whose license is revoked following a chemical test disclosing the presence of unlawful amounts of alcohol (a member of Hass' first "group") will, necessarily, also be the defendant in a criminal DUI prosecution (a member of Hass' second "group"). If criminal prosecution is not brought or is unsuccessful, then the ALR proceeding is dismissed or the driver's license is reinstated. Since no driver's license can be revoked in an ALR proceeding without that driver also facing a criminal DUI prosecution, there is no meaningful delineation between the two "groups" that Hass contends are separate.

[23] This conclusion is dispositive of Hass' equal protection claim. For the sake of completeness, however, we note that were we to proceed to judicial scrutiny of the challenged legislation, Hass' argument would again fail. The rational relationship standard, as the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause of the 14th Amendment to the U.S. Constitution, is offended only if a classification rests on grounds which are wholly irrelevant to the achievement of the government's objectives. *Bauers v. City of Lincoln*, 255 Neb. 572, 586 N.W.2d 452 (1998). As previously noted in our due process analysis, the reservation of Fourth Amendment issues for a criminal DUI prosecution is rationally related to the State's objective of promoting public safety. Because there are no separate classifications at issue in this case, and because the State's policy is reasonable in any event, we conclude that Hass' second assignment of error is without merit.

NOTICE OF TITLE 177

Hass' next assignment of error relates to the hearing officer's taking notice of title 177 of the Nebraska Administrative Code, without the admission into evidence of title 177. The hearing officer took notice of both title 247, which contains rules and regulations of the Department of Motor Vehicles, and title 177, which contains regulations of the Department of Health. The essence of Hass' argument is that the Department of Motor Vehicles may

take notice of its own rules and regulations, but not the rules or regulations of other administrative agencies. Compare Neb. Rev. Stat. § 84-914(5) (Reissue 1999). The district court concluded that this was error, but after a de novo review of the record without considering title 177, the record was still sufficient to sustain the decision of the Department.

[24-26] We do not consider Hass' assignment of error, because the record reveals no indication that Hass objected at the ALR hearing to the hearing officer's taking notice of title 177. Generally, in an appeal under the Administrative Procedure Act, an appellate court will not consider an issue on appeal that was not presented to or passed upon by the administrative agency. See *Metropolitan Utilities Dist. v. Twin Platte NRD*, 250 Neb. 442, 550 N.W.2d 907 (1996). A litigant's failure to make a timely objection waives the right to assert prejudicial error on appeal. *Davis v. Wimes*, 263 Neb. 504, 641 N.W.2d 37 (2002). One cannot silently tolerate error, gamble on a favorable result, and then complain that one guessed wrong. *Maxwell v. Montey*, 262 Neb. 160, 631 N.W.2d 455 (2001).

In this case, Hass was silent when the hearing officer took notice of title 177. Hass did not preserve any error in that ruling for appellate review. Thus, we reject Hass' assignment of error, albeit for reasons other than those relied upon by the court. See *Egan v. Stoler*, ante p. 1, 653 N.W.2d 855 (2002).

NOTARY PUBLIC

Hass' fourth and final assignment of error is based on the fact that the arresting officer's signature on the sworn report was notarized by the technician who administered the Intoxilyzer test. Hass argues that the notary public was an interested party, disqualified from acting in a case where he was interested.

[27,28] Whether a notary is disqualified, by virtue of a relationship or interest, is a factual question to be determined from the circumstances of each particular case. See, *Banking House of A. Castetter v. Stewart*, 70 Neb. 815, 98 N.W. 34 (1904); *Horbach v. Tyrrell*, 48 Neb. 514, 67 N.W. 485 (1896). The general rule is that a notary has a disqualifying interest in a proceeding if the notary has a financial or beneficial interest in the transaction other than receipt of the ordinary notarial fee, or is

named, individually, as a party to the transaction. See *Galloway v. Cinello*, 188 W. Va. 266, 423 S.E.2d 875 (1992) (citing cases). See, generally, Raymond C. Rothman, *Notary Public Practices & Glossary* (1978).

[29-31] The sworn report at issue in this case is, by definition, an affidavit. An affidavit is a written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation. *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995). An affidavit must bear on its face, by the certificate of the officer before whom it is taken, evidence that it was duly sworn to by the party making the same. *Kennedy & Parsons Co. v. Schmidt*, 152 Neb. 637, 42 N.W.2d 191 (1950). An affidavit does not, however, require the notary to confirm the truth of the facts stated in the affidavit; rather, the certificate, also known as a jurat, confirms only that the affiant appeared before the notary, attested to the truth of his or her statements, and signed the affidavit. See Rothman, *supra*.

In this case, Hass has not identified any pecuniary or other beneficial interest that the notary would have in Hass' ALR proceeding. Hass argues only that the notary, having administered the Intoxilyzer test, was a witness to the State's case against Hass. This does not indicate, however, that the notary was impaired by a conflict of interest that would have precluded him from certifying the sworn report of the arresting officer, as the notary still had no personal interest in the outcome of the proceedings against Hass. The notary's function, with respect to the sworn report, was simply to certify that the arresting officer appeared before the notary, affirmed the truth of the statements made in the sworn report, and signed the affidavit. The notary's other function, as the technician who administered the Intoxilyzer test, did not disqualify him from performing his notarial function with respect to the sworn report. In short, there is substantial evidence to support the district court's conclusion that the notary was not disqualified from certifying the sworn report.

[32] Moreover, Hass has not indicated how he might have been prejudiced by such a conflict of interest, had it existed. Hass does not claim that the notary failed to perform his duties properly. Where there is no imputation or charge of improper conduct or

bad faith or undue advantage, the mere fact that an oath was taken before an interested party will not vitiate the ceremony or render it void, if otherwise it is free from objection or criticism. *Galloway, supra*. Hass does not offer any objection to or criticism of the sworn report aside from the observation that the same person administered the Intoxilyzer test and notarized the arresting officer's signature. Absent any indication of actual prejudice to Hass, there is no basis on which to void the sworn report.

The certification of a notary public's official duties, over his or her signature and official seal, is received by the courts as presumptive evidence of the facts certified therein. See Neb. Rev. Stat. § 64-107 (Reissue 1996). Hass offers no challenge to this presumption. In fact, the record shows the contrary, as the arresting officer testified at the ALR hearing to the substance of the facts set forth in the sworn report. Hass has not shown that the notary public was an interested party to this proceeding or how any purported conflict of interest may have worked to Hass' prejudice. Therefore, Hass' final assignment of error is without merit.

CONCLUSION

Hass' constitutional challenges to the ALR scheme are without merit, as are Hass' remaining assignments of error. Therefore, the judgment of the district court is affirmed.

AFFIRMED.

JENNIFER J. MAXWELL, APPELLEE, v. KRISTY J. MONTEY
AND MARVIN L. MONTEY, APPELLANTS, AND
ZEBADIAH KAIN STEBBINS ET AL., APPELLEES.

656 N.W.2d 617

Filed February 21, 2003. No. S-02-361.

1. **Statutes.** Statutory interpretation presents a question of law.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
3. **Statutes.** In construing a statute, a court must look to the statute's purpose and give the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.

4. **Subrogation: Judgments: Damages.** Under Neb. Rev. Stat. § 25-1222.01 (Reissue 1995), a party is entitled to a credit on any judgment rendered against him or her for payments or partial payment of damages made on behalf of such party to an injured person.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Affirmed.

Thomas B. Wood and Stephen L. Ahl, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., for appellants.

Daniel H. Friedman, of Friedman Law Offices, for appellee Jennifer J. Maxwell.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

Jennifer J. Maxwell filed a lawsuit against Kristy J. Montey (Montey) and her father, Marvin L. Montey; Zebadiah Kain Stebbins (Stebbins) and his mother, Diana Lynn Stebbins; and Continental Western Insurance Company for injuries she sustained in an automobile accident. Maxwell alleged that the accident occurred as the result of a “speed contest” between Montey and Stebbins. Maxwell named Montey’s father and Stebbins’ mother as defendants under the family purpose doctrine. The district court granted Stebbins’ motion for directed verdict at the close of Maxwell’s case in chief, and the jury returned a verdict in favor of Maxwell and against the Monteys in the amount of \$250,000. After trial, the district court granted Maxwell’s motion for a new trial against Stebbins but denied the Monteys’ motion for a new trial. Stebbins appealed, and the Monteys cross-appealed. Stebbins and Maxwell subsequently settled their dispute prior to oral argument in the Nebraska Court of Appeals. The Court of Appeals affirmed the judgment of the district court, and we granted the Monteys’ petition for further review. We affirmed the judgment of the Court of Appeals. See *Maxwell v. Montey*, 262 Neb. 160, 631 N.W.2d 455 (2001) (*Maxwell I*).

As part of the settlement between Stebbins and Maxwell, Stebbins paid Maxwell \$15,000 for a full release. Subsequently

to the filing of *Maxwell I*, the Monteys moved the district court to credit the \$15,000 payment against the \$250,000 judgment against them. The Monteys asserted that such credit was required under Neb. Rev. Stat. § 25-1222.01 (Reissue 1995). The district court concluded that § 25-1222.01 did not provide for the relief requested by the Monteys and overruled the Monteys' motion for credit. The Monteys appeal. We affirm.

STATEMENT OF FACTS

The facts relevant to the underlying lawsuit in this case are set forth in *Maxwell I*. In *Maxwell I*, we held, inter alia, that the Monteys were not entitled to an allocation of damages between them and Stebbins under Neb. Rev. Stat. § 25-21,185.10 (Reissue 1995) because the plain language of the statute allowed for the allocation of damages between defendants only when there were multiple defendants at the time the case was submitted to the finder of fact. At the time the case was submitted to the jury, Stebbins had been dismissed. This court's decision in *Maxwell I* was issued on July 13, 2001.

On August 27, 2001, the Monteys filed a motion in the district court, seeking credit for the \$15,000 paid by or on behalf of Stebbins to Maxwell. A hearing on the Monteys' motion for credit was held December 6. On December 21, Maxwell and the Monteys filed a stipulation of facts for the court to consider in deciding the motion. The stipulated facts were as follows:

1. Jennifer J. Maxwell filed a lawsuit against Kristy J. Montey and Marvin L. Montey as a result of an automobile accident that occurred on June 30, 1993 on "O" Street near its intersection with Piazza Terrace in Lincoln, Lancaster County, Nebraska. Zebadiah Kain Stebbins was later added by the Plaintiff as a party Defendant to the lawsuit[.]

2. The Plaintiff's only claim against Defendant Stebbins was based upon the theory that Stebbins was jointly and severally liable with Defendant Montey because he was engaged in a "speed contest" or "race" at the time of the accident. Both Defendant Stebbins and Defendant Montey denied there was a "race" or "speed contest."

3. Neither Defendant Montey nor Defendant Stebbins filed a cross claim against the other in the lawsuit.

4. At the conclusion of the Plaintiff's case in chief, Defendant Stebbins filed a Motion for Directed Verdict which was sustained on the basis that there was not sufficient evidence as a matter of law for the issue of whether Defendant Stebbins and Defendant Montey were engaged in a "speed contest" or a "race" at the time fo [sic] the accident to go to the jury. Defendants Montey did not oppose this motion, nor object to Stebbins being dismissed from the suit.

5. At the conclusion of the trial, the issues of Montey's liability and the amount of Maxwell's damage as a result of the accident went to the jury.

6. The jury determined that Montey was responsible for the accident and the total amount of damages sustained by Maxwell as a result of the accident was in the amount of \$250,000.00.

7. Following the trial, Maxwell filed a Motion for New Trial against Stebbins on the theory that there was sufficient evidence of a "race" or "speed contest" between Stebbins and Montey for the issue to have been presented to the jury. This Motion for New Trial was sustained. The Monteys did not file a motion nor did they join in the Plaintiff's Motion for New Trial against Stebbins.

8. The Monteys also filed a Motion for New Trial against Maxwell, which was heard at the same time, and did not join Stebbins in the motion[.]

9. Maxwell's motion against Stebbins was sustained, and the Monteys['] motion against Maxwell was overruled.

10. The sustaining of the new trial against Stebbins was appealed to the Nebraska Court of Appeals by Stebbins. Defendant Montey did not appeal the Court[']s granting of a new trial against Defendant Stebbins, but did appeal the overruling of their motion against Maxwell.

11. During the pendency of the appeal of the granting of a new trial against Stebbins, a settlement was reached between the Plaintiff Maxwell and Defendant Stebbins that in exchange for the payment to the Plaintiff in the amount of \$15,000.00 the Plaintiff waived her right to a new trial

against Defendant Stebbins and agreed not to retry the case against Defendant Stebbins.

12. As part of the settlement between Plaintiff Maxwell and Defendant Stebbins, the Plaintiff agreed to execute and file a Stipulation for Dismissal with Prejudice and allow a corresponding Order to be entered by the Court in the case caption *Jennifer J. Maxwell, Plaintiff, vs. Kristy J. Montey, Marvin L. Montey, Zebadiah Kain Stebbins and Diana Lynn Stebbins, Defendants* found at Docket 547, Page 108. The Monteys did not object to this Stipulation, nor did they object to the Order dismissing Stebbins.

The Monteys argued to the district court that they were entitled to a credit pursuant to § 25-1222.01, which provides:

No advance payments or partial payment of damages made by an insurance company or other person, firm, trust, or corporation as an accommodation to an injured person or on his behalf to others or to the heirs at law or dependents of a deceased person made under any liability insurance policy, or other voluntary payments made because of an injury, death claim, property loss, or potential claim against any insured or other person, firm, trust, or corporation thereunder shall be construed as an admission of liability by the insured or other person, firm, trust, or corporation, or the payer's recognition of such liability, with respect to such injured or deceased person or with respect to any other claim arising from the same accident or event. Any such payments shall constitute a credit and be deductible from any final settlement made or judgment rendered with respect to such injured or deceased person. In the event of a trial involving such a claim, the fact that such payments have been made shall not be admissible in evidence or brought to the attention of the jury, and the matter of any credit to be deducted from a judgment shall be determined by the court in a separate hearing or upon the stipulation of the parties.

On March 20, 2002, the district court issued an order denying the Monteys' motion for credit. The court concluded that § 25-1222.01 did not "provide the post trial relief sought by [the] Montey[s] which is based on the actions of a non-party

(Stebbins) subsequent to the verdict against [the] Montey[s].” The Monteys appeal.

ASSIGNMENT OF ERROR

The Monteys assert on appeal that the district court erred in concluding that under § 25-1222.01, they were not entitled to a \$15,000 credit against the \$250,000 jury verdict against them.

STANDARDS OF REVIEW

[1,2] Statutory interpretation presents a question of law. *Eyl v. Ciba-Geigy Corp.*, 264 Neb. 582, 650 N.W.2d 744 (2002). When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Id.*

ANALYSIS

The Monteys framed their motion, and the district court decided their motion, solely as a motion for a credit pursuant to § 25-1222.01. Therefore, the only issue before this court on appeal is whether the Monteys were entitled to a credit pursuant to § 25-1222.01.

The Monteys argue that § 25-1222.01 provides that they are entitled to a credit against the \$250,000 judgment against them for the \$15,000 payment that Stebbins made to Maxwell and that the district court erred in denying their motion for credit. In support of their claim, the Monteys rely on the word “any” found in the portion of § 25-1222.01 which states, “Any such payments shall constitute a credit and be deductible from any final settlement made or judgment rendered with respect to such injured or deceased person.” (Emphasis supplied.) The Monteys argue that the use of the word “any” gives a broad meaning to the statute, such that “any” payment to the injured person, regardless of source, would entitle the unsuccessful defendant to a credit. We reject the Monteys’ argument.

[3] In construing a statute, a court must look to the statute’s purpose and give the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it. *Johnson v. Kenney*, ante p. 47, 654 N.W.2d 191 (2002). The Monteys’ argument regarding the credit provided for under § 25-1222.01 places emphasis on the word “any” in

the credit sentence noted above. Reading the statute as a whole, however, it is clear that the purpose of the statute is to facilitate advance payments to injured persons while allowing the party making such payments to avoid having evidence of the payment used at trial as an admission of liability and to ensure that such payments constitute a credit to the payor upon “final settlement” or “judgment” involving the payor. In the context of the entire statute, the “any” language cannot be read broadly to provide that a party subject to a final judgment can receive credit for a payment that was not made by or on behalf of such party.

[4] The construction we place on § 25-1222.01 is consistent with the language of the statute and our prior opinions. In considering § 25-1222.01, we note that § 25-1222.01 as it read in 1967 existed in much the same form as it exists today except, for our purposes, that the statute referred only to payments made by an insurance company. The list of payors whose payment is to be credited was expanded in 1975 to include “other person[s], firm[s], trust[s], or corporation[s].” § 25-1222.01. This court has previously considered § 25-1222.01 and stated, *inter alia*, that under § 25-1222.01, a party is entitled to a credit on any judgment rendered against him or her for payments or partial payment of damages made on behalf of such party to an injured person. See *Beeder v. Fleeer*, 211 Neb. 294, 318 N.W.2d 708 (1982). We did not, nor do we now, approve of the proposition advanced by the Monteys that any payment to an injured person, regardless of source, should be credited to the unsuccessful defendant.

In the present case, the Monteys sought a credit for the \$15,000 payment made by Stebbins to Maxwell. With reference to this payment, the record indicates that a settlement was reached between Maxwell and Stebbins after trial, during the pendency of the appeal. Pursuant to the settlement, Maxwell waived her right to a new trial against Stebbins and agreed not to retry her case against Stebbins in exchange for Stebbins’ payment of \$15,000 to Maxwell. Stebbins’ payment was not made on behalf of the Monteys. Because the \$15,000 payment by Stebbins was not a payment made by or on behalf of the Monteys, it was not the type of payment for which the Monteys could receive a credit pursuant to § 25-1222.01. We therefore reject the Monteys’ assignment of error on appeal and conclude

that the district court did not err in overruling the Monteys' motion for a credit pursuant to § 25-1222.01.

CONCLUSION

We conclude that the district court did not err in determining that § 25-1222.01 does not provide the relief sought by the Monteys in their motion for credit. We therefore affirm the district court's denial of the Monteys' motion for credit pursuant to § 25-1222.01.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
KELLY R. SHIPPS, APPELLANT.
656 N.W.2d 622

Filed February 21, 2003. No. S-02-475.

1. **Motions for Mistrial: Appeal and Error.** The decision whether to grant a motion for mistrial is within the discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion.
2. **Criminal Law: Motions for New Trial: Appeal and Error.** In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.
3. **Criminal Law: Motions for Mistrial: Appeal and Error.** A mistrial is properly granted in a criminal case where an event occurs during the course of a trial which is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and thus prevents a fair trial.
4. **Juries.** Voir dire examination of prospective jurors requires the trial court to give each of the parties the right, within reasonable limits, to put pertinent questions to each and all of the prospective jurors for the purpose of ascertaining whether or not there exist sufficient grounds for challenge for cause and also to aid each of the parties in the exercise of the statutory right of peremptory challenge.
5. **Trial: Evidence: Appeal and Error.** On appeal, a defendant may not assert a different ground for his objection to the admission of evidence than was offered to the trier of fact.
6. **Appeal and Error.** An objection, based on a specific ground and properly overruled, does not preserve a question for appellate review on any other ground.
7. **Due Process: Evidence: Prosecuting Attorneys.** The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or the bad faith of the prosecution.
8. **Constitutional Law: Trial: Evidence.** Favorable evidence is material, and constitutional error results from its suppression by the State, if there is a reasonable

probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.

9. **Trial: Evidence.** A reasonable probability of a different result is shown when the State's evidentiary suppression undermines confidence in the outcome of the trial.
10. **Due Process: Evidence.** To meet the standard of a due process violation, alleged undisclosed exculpatory evidence must be material either to guilt or to punishment.
11. **Trial: Prosecuting Attorneys: Juries.** The conduct of a prosecutor which does not mislead and unduly influence the jury and thereby prejudice the rights of the defendant does not constitute misconduct.
12. **Verdicts: Evidence: Appeal and Error.** A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support the verdict.
13. **Convictions: Evidence: Appeal and Error.** In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.

Appeal from the District Court for Hall County: TERESA K. LUTHER, Judge. Affirmed.

J. Bruce Teichman for appellant.

Don Stenberg, Attorney General, and Kevin J. Slimp for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, McCORMACK, and MILLER-LEMAN, JJ.

WRIGHT, J.

NATURE OF CASE

Kelly R. Shipps appeals from his conviction for kidnapping.

SCOPE OF REVIEW

[1] The decision whether to grant a motion for mistrial is within the discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. *State v. Haltom*, 264 Neb. 976, 653 N.W.2d 232 (2002).

[2] In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed. *State v. Aguilar*, 264 Neb. 899, 652 N.W.2d 894 (2002).

FACTS

Shipps pled not guilty to four counts filed in the Hall County District Court: kidnapping, a Class IA felony, in violation of Neb. Rev. Stat. § 28-313(1) (Reissue 1995); first degree sexual assault, a Class II felony, in violation of Neb. Rev. Stat. § 28-319(1)(a) (Reissue 1995); robbery, a Class II felony, in violation of Neb. Rev. Stat. § 28-324(1) (Reissue 1995); and burglary, a Class III felony, in violation of Neb. Rev. Stat. § 28-507(1) (Reissue 1995). The charges were based on events which occurred in June 2001 involving D.H., a woman Shipps had met in 1999 and with whom he had been involved for about 2 years.

On June 19, 2001, Shipps went to D.H.'s home in the afternoon, and D.H. told Shipps that they should not see each other any more. That night, D.H. went to bed between 11 o'clock and midnight. At about 2 a.m., she was awakened by Shipps, who was holding her wrists in the air very firmly. He said, "'We're going to have sex whether you want to or not.'" D.H. testified that she asked Shipps not to hurt her and then got up and undressed because she knew from the tone of his voice that Shipps was serious and she did not want to "get beat up."

D.H. said she did not think she could get away from Shipps or resist having sex with him. During the night, they had sex twice. Shipps went to the bathroom once during the night, but D.H. did not try to leave because she thought she would be safe if she allowed Shipps to stay until he went to work in the morning.

At about 5 a.m. on June 20, 2001, D.H. arose, dressed, and made coffee because Shipps said he was going to work soon. Shipps appeared in the kitchen undressed and said he wanted D.H. to have sex with him again. D.H. said that Shipps talked her into doing so and that they returned to the bedroom, where they had sex again. D.H. then got up and began to dress because she thought she would need to drive Shipps to work.

Before D.H. could put on a blouse, Shipps playfully pushed her down onto the bed. Shipps then got on D.H.'s stomach and chest, slipped twine around one of her wrists, and yanked the twine until it was tight. Shipps yelled at D.H. and accused her of using him. He then looped the twine twice around her neck. D.H. repeated, "'You don't want to do this.'" Shipps said he wanted D.H.'s other hand, and as she started to give it to him, D.H. began screaming.

Shipps told her that if she did not let him tie her up, he would beat her. D.H. said that she gave him her wrists and that he tightened the twine around her neck. D.H. began praying, and Shipps said, “‘You better pray.’” He then tied the twine to the bedposts.

Shipps left the room and returned with duct tape, which he put over D.H.’s mouth and around her ankles. Shipps left again, but he returned, untied the twine, and helped D.H. get up as she motioned toward the bathroom. He removed the duct tape from her mouth. Shipps picked up D.H., threw her over his right shoulder, and carried her down the basement stairs into the washroom, where he put her down by a table. Shipps indicated that D.H. should walk the rest of the way to the bathroom, but she said she could not walk. Shipps picked her up, carried her into the bathroom, helped her pull down her pants, and sat her on the stool.

Shipps went back upstairs and returned with a light bulb because there was no other light downstairs. He told D.H. he would be back after work. Shipps then went upstairs and got the duct tape. He put more duct tape on the twine, tied D.H.’s hands together, and put tape around her hands, chest, and arms. Shipps asked her if she was all right, and he then left the room.

Although D.H. felt that the twine was a little loose, she sat and waited 30 to 45 minutes for Shipps to leave for work. When she could not hear any noise in the house, she pulled her arms out of the twine, removed the duct tape from her mouth, and used her teeth to unfasten some of the tape. She used her belt buckle to scratch through the duct tape on her legs. She pushed at the bathroom door and was able to push boxes off a table that Shipps had placed in front of the door. She ran upstairs, unlocked the back door, and then went to get her purse. She next ran into the bedroom, grabbed a shirt, and ran to a neighbor’s house, but no one was home.

D.H. then ran two to three blocks to a friend’s house. After the police were called, D.H. was taken to a hospital for medical examination. She also discovered that her billfold, which had contained \$2 to \$3, was missing.

The friend testified that when D.H. arrived that morning, D.H. was shaking, traumatized, and very upset. D.H. was carrying her purse on one arm, her belt buckle was hanging from her pants, and there was duct tape residue at the bottom of her pants. The

friend observed red marks about a half-inch wide on D.H.'s neck and wrists.

A police officer found D.H.'s vehicle in a parking lot about a block north of Shipps' workplace. In a search of D.H.'s house, police found twine and pieces of duct tape, but no evidence of forced entry.

Shipps testified that he was married and had three children. Shipps said that during his relationship with D.H., he bought groceries and paid her gas bills, car payments, car insurance, and rent. Shipps said he also shoveled snow, mowed, did general housekeeping, repaired items around the house, and helped D.H. move once before he injured his hand. Shipps said he and D.H. did not socialize with others because D.H. did not want people to know they were together.

Shipps testified that he was at work on June 19, 2001, when D.H. called and asked him to buy some twine, which he purchased at a hardware store after work. When he showed her the twine, she said it was not the right kind to use for a clothesline. Shipps said he went to physical therapy at 3 p.m. and then to a friend's house. He returned to D.H.'s house at 12:45 or 1 a.m. and knocked on the door, and D.H. let him in. They went to bed, had sex, and then went to sleep. Shipps said he woke up at 6 a.m. and took D.H.'s vehicle to work. He said they had argued about money and about Shipps' providing support to D.H. Shipps said he had told D.H. that he could not afford to pay her bills all the time and that the relationship needed to end. He later testified that he and D.H. argued when she said she wanted to break off the relationship. Shipps said he did not break into D.H.'s house and did not have sex with her without her permission. He stated that he never beat or threatened her and that he did not bind her with twine and duct tape.

A jury found Shipps guilty of kidnapping and not guilty of the other three charges. His motion for new trial was overruled at the time he was sentenced on April 2, 2002. The trial court sentenced Shipps to life imprisonment, which is the required sentence for a Class IA felony. See Neb. Rev. Stat. § 28-105(1) (Cum. Supp. 2002).

On April 8, 2002, Shipps filed a supplementary motion for new trial, asserting that the State had failed to disclose it had

information concerning whether Shipps was able to use his right hand at the time of the alleged incident. That motion was also overruled. Shipps appeals from the denial of his motions for new trial.

ASSIGNMENTS OF ERROR

Shipps asserts numerous errors that can be summarized as follows: (1) The trial court erred in denying his motions for mistrial and for new trial based on the State's comments during voir dire that Shipps was a married man who had engaged in an adulterous relationship; (2) the trial court erred in denying his motions for mistrial and for new trial based on the State's production of inflammatory, prejudicial, and irrelevant testimony from a witness in violation of U.S. Const. amend. XIV and Neb. Const. art. I, § 3; (3) the trial court erred in failing to grant a new trial when the State wrongfully withheld exculpatory material which had been requested during discovery, depriving Shipps of a fair trial under U.S. Const. amend. XIV and Neb. Const. art. I, § 3; (4) the trial court erred in failing to grant a new trial based on prosecutorial misconduct; and (5) cumulative trial error denied Shipps his constitutional right to a fair trial.

ANALYSIS

STATE'S REMARKS DURING VOIR DIRE

Shipps asserts that the trial court erred in denying his motions for mistrial and for new trial based on the State's remarks during voir dire that Shipps was a married man who had engaged in an adulterous relationship.

During voir dire, the trial court asked a number of questions of the prospective jurors, and then the State began its questioning by indicating that the case involved sexual matters. The prosecutor said:

The evidence, I think, is going to show, ladies and gentlemen, that when the defendant, Kelly Shipps, was having — he had a relationship with an individual named [D.H.] who is the victim. At the time that Mr. Shipps and [D.H.] were having the relationship, Mr. Shipps was still married.

Do any of you feel that the fact that —

At that point, defense counsel objected, and a sidebar conference was held. Defense counsel's motion for a mistrial was overruled.

The prosecutor then asked, "Do any of you feel that if a woman is engaged in a relationship with a married guy, that means she deserves whatever she gets? In other words, it's okay to sexually assault somebody if they've been having an affair?" The defense raised no objection to these questions. The State continued its line of questioning about sexual relationships and sexual assault without objection.

During defense counsel's questioning on voir dire, he stated: [Y]ou heard statements before that Mr. Shipps was married, and the testimony will come out that Mr. Shipps indeed was married. Mr. Shipps had had a long-time relationship with the complaining witness, [D.H.], and that this — that Mr. Shipps spending the night with [D.H.] was a frequent event despite the fact he was married, and does the fact — well, does the fact that this information will come out, will this cause you to be prejudiced to Mr. Shipps so that you wouldn't be able to provide a fair verdict for him? And that means following the judge's instructions?

Counsel continued:

This is a case involving a married man who's had a relationship. I think the term of art is a meretricious relationship with another woman, and now he's accused of having sex with this other woman without her consent.

Would this cause you any problems in judging this case and following the judge's instructions?

At one point, the trial court intervened and stated:

Whether or not the victim or the defendant was married is not an element of [the] crime, so it is not relevant to the proof in this case. So given that, do you think you would be able to fairly judge it, knowing that the defendant was or was not a married man, and simply stick to what I tell you the State has to prove?

Shipps claims that the prosecutor's comments about the relationship between Shipps and D.H. poisoned the proceedings from the beginning because his marital status and the adulterous relationship had no relevance to the charges brought against him.

[3] The decision whether to grant a motion for mistrial is within the discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. *State v. Haltom*,

264 Neb. 976, 653 N.W.2d 232 (2002). A mistrial is properly granted in a criminal case where an event occurs during the course of a trial which is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and thus prevents a fair trial. *State v. Myers*, 258 Neb. 272, 603 N.W.2d 390 (1999). In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed. *State v. Aguilar*, 264 Neb. 899, 652 N.W.2d 894 (2002).

[4] The right of both parties in a criminal action to question prospective jurors is well established. This court has long held that voir dire examination of prospective jurors

requires the trial court to give each of the parties the right, within reasonable limits, to put pertinent questions to each and all of the prospective jurors for the purpose of ascertaining whether or not there exists [sic] sufficient grounds for challenge for cause and also to aid each of the parties in the exercise of the statutory right of peremptory challenge.

Oden v. State, 166 Neb. 729, 735, 90 N.W.2d 356, 360 (1958).

The *Oden* court cited to *Strong v. State*, 106 Neb. 339, 340, 183 N.W. 559, 559-60 (1921), in which the court stated:

The principal purpose of the *voir dire* examination is to ascertain whether the proposed juror is free from bias or prejudice, and whether he is in such attitude of mind with respect to the case in hand that he would be a fair and impartial juror. With this end in view, it is the policy of the law to give to the parties ample opportunity to question the venireman upon matters bearing upon his competency, and questions which tend to show his attitude of mind and feelings should not be unreasonably abridged. And as each party has the right to exercise a certain number of peremptory challenges, it is proper, within reasonable limits, to propound questions which, in the judgment of the respective parties, may assist them in the exercise of that right. The extent to which the examination may be carried rests in the sound discretion of the trial court, and its ruling will not be disturbed unless there has been an abuse of discretion to the prejudice of the party complaining.

See, also, *Trebelhorn v. Bartlett*, 154 Neb. 113, 47 N.W.2d 374 (1951).

The questions asked by the prosecutor during voir dire can be interpreted as an attempt to determine the “attitude of mind and feelings” of the jurors. See *Strong*, 106 Neb. at 340, 183 N.W. at 559. The State has the right within reasonable limits to ask questions which will assist it in exercising its peremptory challenges. Shipps was charged with sexual assault. The relationship between Shipps and D.H. included consensual sex, and it may have been important for the State to ask prospective jurors whether they could determine the case based solely on the evidence or whether they had preconceived notions about the character of the parties. The defense also asked questions about the issue after objecting to the State’s comments, indicating that the defense had concerns about the jury’s thoughts and feelings related to an adulterous relationship.

The trial court did not abuse its discretion in denying both the motion for mistrial and the motion for new trial on the basis of the State’s remarks during voir dire. These assignments of error have no merit.

TESTIMONY OF SANDY HULL

Shipps argues that the trial court erred in denying his motions for mistrial and for new trial based on the State’s production of inflammatory, prejudicial, and irrelevant testimony from Sandy Hull in violation of U.S. Const. amend. XIV and Neb. Const. art. I, § 3. Hull was called as a witness on behalf of the State.

Shipps’ defense was based, at least in part, on a claim that he had been injured and did not have full use of his right hand at the time of the alleged incident. Hull, a friend of Shipps, testified that during the week of June 20, 2001, Shipps could not help move a couch because of his injury. Hull had earlier told a police officer that Shipps was able to help move the couch. Hull said that Shipps could use his right arm, but not his right hand. Hull added that he had seen Shipps move a small dresser with his left hand and right arm, but Hull never saw Shipps grasp anything with his right hand.

Hull also testified that for 2 years prior to the alleged crime, Shipps and Hull played pool together several times a week.

Shipps stopped playing pool with his right hand after his work accident because he could not hold a pool cue in that hand. He subsequently tried to play pool with his left hand. Hull saw Shipps playing pool left handed approximately 1 week before June 20, 2001.

Shipps objected when the State questioned Hull as follows: “Q[.] You were a very good friend of [Shipps], is that correct? A[.] Yes. Q[.] Okay. In fact, during 2001 you would perform a favor for [Shipps], if women stopped by your house” Defense counsel interposed an objection to the question as leading and irrelevant. Arguments on the objection were held in camera, with both parties waiving the presence of a court reporter. The objection was overruled.

The State proceeded with its questioning: “If a woman stopped by your place . . . and asked for [Shipps], what would you tell [her]?” Defense counsel again objected, on grounds of foundation and that the form of the question was hypothetical, and the objection was overruled. Hull stated that he would tell the woman that Shipps was living there but was not home at the time. Hull admitted that Shipps was not in fact living there and that he had lied for Shipps. On recross-examination, Hull stated that he did not know where Shipps was when he was not at Hull’s house, but that Shipps could have been at D.H.’s house.

At trial, Shipps first objected as to the relevance of the question about Hull’s performing a favor for him. Shipps’ second objection was based on foundation and the form of the question. In his brief, Shipps also objects to the use of Hull’s testimony as impeachment. Shipps argues that this testimony, on collateral matters, was used to impeach at a time when he had not decided whether he was going to testify at trial, and that thus, he was forced to modify his trial strategy in order to address the impeachment.

[5,6] The record shows that Shipps’ complaints concerning whether this testimony constituted improper impeachment were not raised before the trial court. On appeal, a defendant may not assert a different ground for his objection to the admission of evidence than was offered to the trier of fact. *State v. Timmens*, 263 Neb. 622, 641 N.W.2d 383 (2002). An objection, based on a specific ground and properly overruled, does not preserve a question for appellate review on any other ground. *Id.* Thus, Shipps has

waived any objection that might have been made to Hull's testimony on the basis of impeachment.

It appears that the State's questions were intended to demonstrate that as a friend of Shipps, Hull was willing to be less than truthful. Neb. Rev. Stat. § 27-607 (Reissue 1995) provides that the credibility of a witness "may be attacked by any party, including the party calling him." See, also, *State v. Marco*, 220 Neb. 96, 368 N.W.2d 470 (1985). The relationship between Hull and Shipps could be seen as close enough that Hull was willing to show bias in his testimony. The State was attempting to demonstrate this bias, and its questioning was not improper. The trial court did not abuse its discretion in failing to grant a mistrial or new trial on the basis of Hull's testimony.

BRADY VIOLATION

Shipps asserts that the trial court erred in failing to grant a new trial after the State wrongfully withheld exculpatory material which had been requested during discovery, depriving Shipps of a fair trial under U.S. Const. amend. XIV and Neb. Const. art. I, § 3.

[7-9] Under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and *Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995), the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or the bad faith of the prosecution. *State v. Castor*, 257 Neb. 572, 599 N.W.2d 201 (1999). Favorable evidence is material, and constitutional error results from its suppression by the State, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Id.* A reasonable probability of a different result is accordingly shown when the State's evidentiary suppression undermines confidence in the outcome of the trial. *Id.*

This assignment of error relates to Shipps' claim that because of the injury to his hand in March 2001, he would have been prevented from binding D.H. as she described. Shipps testified that he worked as an apprentice meatcutter at a grocery store and that he was not able to use his right hand in June 2001.

Rhonda Skiles, human resource coordinator for the grocery store in question, testified that on March 27, 2001, when Shipps filled out a workers' compensation claim, his hand was wrapped in a bandage and was in a splint held tightly to his torso. She said she told Shipps' supervisor that Shipps was not to use his right hand and that he should do no pushing, pulling, grasping, or fine manipulation of any type with his right hand. He was to be assigned only left-hand work. The restrictions continued through June 2001.

Rodney Thorngate, manager of the meat and seafood departments at the grocery store, testified that Shipps injured his right hand in March 2001 and was placed on light duty. By June, Shipps was able to stock shelves with his left hand if someone else opened boxes for him, and he could perform cleaning tasks. Shipps was not expected to grip, push, lift, or exercise any fine tasks with his right hand. Thorngate said he observed Shipps balancing items on his right shoulder, elbow, and upper arm.

Rory Miles, a friend of Shipps, testified that in June 2001, Shipps was not playing in a pool league because he had cut his hand in a meat grinder at work.

D.H. testified that Shipps helped her move in May 2001 and that during the move, she saw Shipps picking up items with both hands or with his left hand and his right forearm. D.H. said she saw Shipps use his right hand between May 15 and June 20. At first, he was unable to do much with it, but then he could pick up light items. D.H. said Shipps had more strength when he held the hand in a certain position. She could not remember whether he was using one hand or both hands when he was tying her with the twine or using the duct tape.

Shipps argues that the evidence at trial was equally balanced as to whether he was able to use his right hand at the time of the alleged incident. Shipps claims that when he and his defense counsel reviewed the presentence investigation report on April 2, 2002, the day of sentencing, they found a report concerning a followup interview completed by Investigator Kelly Williams of the Grand Island Police Department. The report stated that Rhonda White had told Williams on September 10, 2001, that she saw Shipps about once a week between the time of his hand injury and the time he was arrested. She said he periodically stayed

overnight at her home and that for a time, he lived with her. White reported that she never saw Shipps without a brace on his hand, nor did she see him use the injured hand for any purpose.

Williams testified during the State's rebuttal that when he first observed Shipps at Shipps' place of employment, Shipps' right arm was in a brace, without a sling. Shipps' counsel had interviewed White on other matters, but counsel claims that he did not know that White had made the above-mentioned statement concerning Shipps' hand and brace to police and that he did not learn of it until 6 weeks after trial, at the time of Shipps' sentencing.

Shipps argues that White's statements to Williams could have been used to impeach Williams' testimony. This argument is difficult to comprehend. To "impeach" means "[t]o discredit the veracity of (a witness)." Black's Law Dictionary 755 (7th ed. 1999). White told Williams that she had seen Shipps wearing a brace on his hand and that she did not see him use the hand. Williams also testified that he saw a brace on Shipps' hand. Shipps argues that he could have used the report of the interview with White to discredit the veracity of Williams' testimony. White and Williams testified to the same fact—seeing Shipps with a brace on his hand. This alleged error has no merit.

The State argues that Shipps has waived this allegation of error because he made no objection to the presentence investigation report when asked if he was prepared for sentencing on April 2, 2002. We do not decide the waiver issue because Shipps has not shown that Williams' report is a violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

[10] To meet the standard of a due process violation, alleged undisclosed exculpatory evidence must be "'material either to guilt or to punishment.'" See *State v. Castor*, 257 Neb. 572, 584, 599 N.W.2d 201, 211 (1999). Shipps presented other evidence concerning his hand injury, and the jury was free to take it into consideration. For constitutional error to result from nondisclosure of evidence, there must have been "'a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Id.* The mere fact that one more witness could have testified concerning

whether Shipps was able to use his hand does not support a finding that the result of the trial would have been different.

The police report describing the interview with White did not prejudice Shipps, whose counsel had previously interviewed White. We conclude that any failure to disclose the report does not undermine confidence in the outcome of the trial, and this assignment of error therefore has no merit.

PROSECUTORIAL MISCONDUCT

[11] Shipps assigns as error the trial court's failure to grant a new trial based on prosecutorial misconduct. The conduct of a prosecutor which does not mislead and unduly influence the jury and thereby prejudice the rights of the defendant does not constitute misconduct. *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000). As noted above, none of the actions of the prosecutor constituted misconduct, nor did they mislead or unduly influence the jury. The court did not abuse its discretion in failing to grant a new trial on this basis.

CUMULATIVE TRIAL ERROR

Finally, Shipps alleges that he was denied his constitutional right to a fair trial by cumulative trial error, reasserting the errors discussed above.

[12,13] A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support the verdict. *State v. Spurgin*, 261 Neb. 427, 623 N.W.2d 644 (2001). The jury heard the first-person account of D.H., who described the events of the day in question. It heard the testimony of D.H.'s friend, who observed D.H. immediately after she escaped. It heard Shipps' own testimony as to his actions on the day in question. In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Jackson*, 264 Neb. 420, 648 N.W.2d 282 (2002). The evidence here is sufficient, and the assigned errors do not require a new trial.

CONCLUSION

The trial court did not abuse its discretion in denying Shipps' motions for new trial and for mistrial based on the State's comments during voir dire, the introduction of testimony from Hull, or any other alleged prosecutorial misconduct. The court did not err in failing to grant a new trial based on the alleged failure to disclose exculpatory material per *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and we do not find cumulative trial error which demonstrates that Shipps was denied his constitutional right to a fair trial. Thus, the judgment of conviction is affirmed.

AFFIRMED.

MICHAEL R. BREEDEN AND CARILYN BREEDEN, HUSBAND
AND WIFE, APPELLANTS AND CROSS-APPELLEES, V.
ANESTHESIA WEST, P.C., ET AL., APPELLEES
AND CROSS-APPELLANTS.
656 N.W.2d 913

Filed February 28, 2003. No. S-01-774.

1. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction.
2. **Negligence.** Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular case.
3. _____. Whether a duty is nondelegable is a question of law.
4. _____. There is no set formula for determining when a duty is nondelegable. Whether a particular duty is properly categorized as nondelegable necessarily entails a sui generis inquiry, since the conclusion ultimately rests on policy considerations.
5. **Negligence: Liability: Independent Contractor: Words and Phrases.** A nondelegable duty means that an employer of an independent contractor, by assigning work consequent to a duty, is not relieved from liability arising from the delegated duties negligently performed. As a result of a nondelegable duty, the responsibility or ultimate liability for proper performance of a duty cannot be delegated, although actual performance of the task required by a nondelegable duty may be done by another.
6. **Negligence.** The person owing a nondelegable duty is not excused from taking the necessary precautions by contracting with or relying on others to take necessary precautionary measures.
7. **Malpractice: Physicians and Surgeons: Negligence.** The rationale behind nondelegable duties does not limit their application to principal surgeons, since the

determination of whether a particular duty is nondelegable is a question of law which ultimately rests on policy considerations.

8. **Negligence.** The risk reasonably to be perceived defines the duty to be obeyed.
9. _____. Under established principles, one's reasonable expectations and beliefs about who will render a particular service are a significant factor in identifying duties that should be deemed to be nondelegable.
10. **Physician and Patient: Negligence: Public Policy.** Public interest warrants the imposition of a nondelegable duty upon an anesthesiologist to be aware of reasonably available medical information significant to the health of his or her patient prior to administering anesthesia.
11. **Malpractice: Physicians and Surgeons.** The appropriate standard of care in a medical malpractice action is a question of fact.
12. **Trial: Jury Instructions: Appeal and Error.** In order to appeal a jury instruction, an objection to the proposed instruction must be made at the trial level.
13. **Malpractice: Physicians and Surgeons: Expert Witnesses.** Except in exceptional cases, each element of a claim of medical malpractice must be proved through expert testimony.
14. **Rules of Evidence.** Where a Nebraska Evidence Rule is substantially similar to a corresponding federal rule of evidence, Nebraska courts will look to federal decisions interpreting the corresponding federal rule for guidance in construing the Nebraska rule.
15. **Rules of Evidence: Expert Witnesses.** Pursuant to Neb. Rev. Stat. § 27-803(17) (Cum. Supp. 2002), learned treatises which have been established as a reliable authority are admissible into evidence only to the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination.
16. **Malpractice: Physicians and Surgeons: Evidence: Expert Witnesses.** Duty admitted learned treatises do not independently establish the standard of care in a medical malpractice action. They are merely evidence of the standard of care to the extent relied upon by the expert witness in direct examination, or called to the attention of the expert witness upon cross-examination.
17. **Witnesses: Testimony: Juries.** A nonparty witness' changed testimony, even if made without reasonable explanation and in order to meet the exigencies of pending litigation, is but a factor to be considered by the jury when determining the weight and credibility to be given the witness' testimony.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Reversed and remanded for a new trial.

Daniel B. Cullan, Paul W. Madgett, and Diana J. Vogt, of Cullan & Cullan, for appellants.

David D. Ernst and Earl G. Greene III, of Gaines, Pansing & Hogan, for appellees Wesley K. Hubka and Janet Lemonds.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, McCORMACK, and MILLER-LERMAN, JJ.

HENDRY, C.J.

I. INTRODUCTION

Michael R. Breeden and Carilyn Breeden sued appellees Anesthesia West, P.C., and its employees Dr. Wesley K. Hubka, an anesthesiologist, and Janet Lemonds, a nurse anesthetist, for medical malpractice. (Appellees are referred to collectively herein as "Anesthesia West.") The Breedens alleged that Michael Breeden (hereinafter Breeden) suffered brain damage as a result of Dr. Hubka's and Lemonds' negligence in administering general anesthesia during Breeden's gallbladder removal surgery. The Breedens appeal a jury verdict in favor of Anesthesia West.

II. FACTUAL BACKGROUND

Breeden was admitted to Methodist Hospital in Omaha, Nebraska, on August 14, 1994, to have his gallbladder surgically removed. During the evening of August 15, Dr. Doug Rennels, an anesthesiologist, conducted a preanesthetic evaluation of Breeden. Such examination disclosed, *inter alia*, no evidence of "peripheral neurological deficits."

During the morning of August 16, Nurse Joyce Clark, an employee of Methodist Hospital, again evaluated Breeden's condition. As a result of this evaluation, Clark made an entry in Breeden's electronic file on Methodist Hospital's computer system that Breeden was experiencing "TINGLING OF RT LEG, RT SIDE OF BODY TO MID CHEST." The entry reflected that Clark observed the symptom at 9:50 a.m.

At approximately 10:35 a.m., Breeden was taken to the preoperation holding area in order to receive general anesthesia. There, Breeden's condition was again evaluated, this time by Dr. Hubka, after which Dr. Hubka and Lemonds administered general anesthesia to Breeden. Although, according to Dr. Hubka, there were "at least three" computers in the preoperation holding area on which the nursing notes in Breeden's electronic file could have been accessed, neither Dr. Hubka nor Lemonds accessed Breeden's electronic file to read Clark's entry prior to administering anesthesia. Breeden's anesthesia was monitored throughout the surgery by Dr. Hubka and Lemonds.

The Breedens filed a medical malpractice action against Anesthesia West, alleging that Dr. Hubka and Lemonds were

negligent in administering general anesthesia and that as a result, Breeden suffered brain damage. In their operative petition, the Breedens alleged, inter alia, that Dr. Hubka and Lemonds breached their duty to “[e]nsure that [Breeden’s] surgery was postponed” based on the information in Clark’s note.

During two pretrial depositions, Clark gave conflicting testimony regarding the time she actually entered the note regarding Breeden’s “tingling” symptom into the Methodist Hospital computer system. Clark testified in her first deposition that she entered the note at 9:50 a.m. on August 16. However, in her second deposition, Clark testified she may have entered the note later in the day, after Breeden’s surgery.

Prior to trial, the district court ruled, over Anesthesia West’s objection, that pursuant to *Momsen v. Nebraska Methodist Hospital*, 210 Neb. 45, 313 N.W.2d 208 (1981), Clark’s “earlier deposition which indicates that the entry was made at a time on or before the day of surgery or the specific words of her own testimony will be the testimony at trial as a matter of law.” Such determination was ultimately incorporated into jury instruction No. 5, which provided that “[t]he Court has determined as a matter of law that the following fact exists and you must accept it as true: Nurse Joyce Clark entered her nursing note on the computer at 9:50 a.m. on August 16, 1994.”

At trial, the Breedens’ expert, Dr. Richard Fields, opined that Clark’s note indicating Breeden complained of “tingling” in his right side and right leg might have reflected a transient ischemic attack, or “TIA,” a condition during which the brain receives insufficient oxygen. Dr. Fields opined that administering general anesthesia to a patient suffering a TIA “puts [the patient] at extreme risk of producing a permanent bad result or aggravating — extending the problems that he has.”

Dr. Hubka agreed that if Breeden was suffering from a TIA prior to surgery, his anesthesia should have been postponed. Dr. Hubka asserted, however, that he acted within the prevailing standard of care by relying on Clark to verbally report to him if, in her view, the “tingling” symptom was significant. Dr. Hubka stated that “[n]urses will always call us and give us reports on significant findings that they’ve made.” In Dr. Hubka’s view, the fact that Clark did not verbally communicate to him concerns about the

“tingling” symptom suggested that Breeden probably was not suffering from a TIA prior to surgery. Similarly, Anesthesia West’s expert, Dr. Myrna Newland, an anesthesiologist and member of the faculty at the University of Nebraska Medical Center, opined that Dr. Hubka acted within the prevailing standard of care by relying on nurses to verbally report “significant” symptoms to him. Dr. Newland stated that in her practice, “we depend on the preoperative nurse and the nurse taking care of the patient to communicate any significant change that should be brought to our attention.”

The jury returned a verdict in favor of Anesthesia West and against the Breedens. The Breedens moved for a new trial, which was overruled by the district court. The Breedens appealed. We moved the case to our docket pursuant to our authority to regulate the caseloads of this court and the Nebraska Court of Appeals. Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

III. ASSIGNMENTS OF ERROR

The Breedens assign, rephrased, that the district court erred in (1) “fail[ing] to give Instruction No. 12A [which provided] that the duties of an anesthesiologist [are] nondelegable”; (2) giving jury instruction No. 9 regarding the applicable standard of care because it “violated Due Process, misstated the law, was misleading, and was not supported by the evidence”; (3) “fail[ing] to modify Instruction 9. to correctly state the law”; (4) failing to grant the Breedens’ motion for a mistrial; and (5) denying the Breedens’ motion for a new trial.

IV. CROSS-APPEAL

Anesthesia West assigns on cross-appeal that the district court erred (1) “[w]hen it ruled as a matter of law that the inconsistent, nonparty witness statement made by Clark constituted changed testimony for the exigencies of trial pursuant to *Momsen v. Nebraska Methodist Hospital*, 210 Neb. 45, 313 N.W.2d 208 (1981),” and (2) “[b]y the giving of Jury Instruction No. 5 because the court gave the instruction based on its erroneous application of *Momsen* to the testimony of the witness Joyce Clark.”

V. STANDARD OF REVIEW

Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular case. *Fu v.*

State, 263 Neb. 848, 643 N.W.2d 659 (2002); *Sharkey v. Board of Regents*, 260 Neb. 166, 615 N.W.2d 889 (2000).

To establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction. *Malone v. American Bus. Info.*, 264 Neb. 127, 647 N.W.2d 569 (2002); *Springer v. Bohling*, 263 Neb. 802, 643 N.W.2d 386 (2002).

Whether the jury instructions given by a trial court are correct is a question of law. *Malone, supra*; *Springer, supra*. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Smith v. Fire Ins. Exch. of Los Angeles*, 261 Neb. 857, 626 N.W.2d 534 (2001); *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001).

VI. ANALYSIS

1. JURY INSTRUCTION NO. 12A

The Breedens first assign that the district court erred by refusing to give the Breedens' tendered jury instruction No. 12A. Instruction No. 12A provided:

The duty to read the nursing notes from the period immediately after the Pre-Anesthesia Evaluation through the period immediately before surgery is a duty owed by the anesthesiologists. It is a nondelegable duty. That means the anesthesiologist by assigning to another the duty to read such nursing notes is not relieve[d] from liability arising from the delegated duties if they are negligently performed.

Since the duty to read such nursing notes is a non-delega[ble] duty, the responsibility and ultimate liability for the proper performance of that duty cannot be delegated, although the actual performance of the task may be done by another.

[1] To establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law,

(2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction. *Malone, supra*; *Springer, supra*.

(a) Correct Statement of Law and
Warranted by the Evidence

[2] Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular case. *Fu, supra*; *Sharkey, supra*. This court has previously held that in certain circumstances, the ultimate responsibility for the performance of duties owed by a physician to his or her patient is non-delegable. *Hawkes v. Lewis*, 252 Neb. 178, 560 N.W.2d 844 (1997); *Long v. Hacker*, 246 Neb. 547, 520 N.W.2d 195 (1994); *Swierczek v. Lynch*, 237 Neb. 469, 466 N.W.2d 512 (1991).

In *Hawkes, supra*, this court held that "the surgeon in charge" of performing an abdominal hysterectomy owed a nondelegable duty to his patient to properly "pack away" the patient's small intestine during the surgery so as to avoid damage to surrounding organs. 252 Neb. at 179, 181, 560 N.W.2d at 846-47. In *Swierczek, supra*, this court held that the "surgeon in charge" while an operation was in progress had a nondelegable duty to ensure the safety of his patient while she was in the operating room having her teeth removed. 237 Neb. at 479, 466 N.W.2d at 518. See, also, *Burns v. Metz*, 245 Neb. 428, 513 N.W.2d 505 (1994) (noting that principal surgeon performing breast reduction surgery had nondelegable duty to properly close surgical incisions).

Long, supra, involved a surgeon who, in reliance on a radiologist's misinterpretation of a spinal x ray, operated on the wrong vertebrae of his patient's spine. In the ensuing medical malpractice action brought by the patient against the surgeon, the surgeon contended that he acted within the prevailing standard of care by relying on the radiologist's x-ray interpretation to localize the operative site of his patient.

This court found no merit in the surgeon's contention. We relied on our prior decisions in medical malpractice cases as authority for the rule that "a head surgeon is ultimately liable for the negligent acts or omissions of others who are assisting in the surgery." *Id.* at 555, 520 N.W.2d at 201. Accordingly, we held that

the ultimate responsibility for identifying the operative site of his patient could not be delegated by the surgeon to the radiologist.

The nondelegable duty rule evolved as an exception to the general rule that an employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants. *Erickson v. Monarch Indus.*, 216 Neb. 875, 347 N.W.2d 99 (1984); *Sullivan v. Geo. A. Hormel and Co.*, 208 Neb. 262, 303 N.W.2d 476 (1981); Restatement (Second) of Torts § 409 (1965). See, also, *Kleeman v. Rheingold*, 81 N.Y.2d 270, 614 N.E.2d 712, 598 N.Y.S.2d 149 (1993); *Saiz v. Belen School Dist.*, 113 N.M. 387, 393, 827 P.2d 102, 108 (1992) (noting that “[t]he absence of a right of control over the manner in which the work is to be done is the most commonly accepted criterion for distinguishing independent contractors from employees whose negligence the employer is vicariously liable”).

[3,4] Whether a duty is nondelegable is a question of law. *Saiz, supra*; *Summers v. A.L. Gilbert Co.*, 69 Cal. App. 4th 1155, 82 Cal. Rptr. 2d 162 (1999). There is no set formula for determining when a duty is nondelegable. “Indeed, whether a particular duty is properly categorized as ‘nondelegable’ necessarily entails a *sui generis* inquiry, since the conclusion ultimately rests on policy considerations.” *Kleeman*, 81 N.Y.2d at 275, 614 N.E.2d at 715, 598 N.Y.S.2d at 152. See, also, Restatement, *supra*, Introductory Note for §§ 416 to 429. As stated by the Michigan Supreme Court in *Funk v General Motors Corp*, 392 Mich. 91, 101-02, 220 N.W.2d 641, 645 (1974), *abrogated on other grounds*, *Hardy v Monsanto Enviro-Chem*, 414 Mich. 29, 323 N.W.2d 270 (1982), which was cited with approval in *Erickson, supra*:

Inevitably it becomes a matter of judgment, case by case, where to draw the line between so-called “delegable” and “nondelegable” tasks and duties. In a given case, the policy question facing a court (the law of torts is largely judge-made) is whether on the facts presented the public interest warrants imposition upon a person who has delegated a task the duty to guard against risks implicit in the performance of the task.

Courts have often deemed a duty to be nondelegable when “‘the responsibility is so important to the community that the employer should not be permitted to transfer it to another.’”

Feliberty v. Damon, 72 N.Y.2d 112, 119, 527 N.E.2d 261, 264, 531 N.Y.S.2d 778, 781 (1988) (quoting W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 71 (5th ed. 1984)). See, also, Restatement, *supra*, §§ 417 and 418; *Hammond v. The Nebraska Nat. Gas Co.*, 204 Neb. 80, 281 N.W.2d 520 (1979) (holding that duty natural gas utility owed to public to install safe natural gas pipelines was nondelegable).

[5,6] The exception for nondelegable duties “requires the person upon whom it is imposed to answer for it that care is exercised by anyone, even though he be an independent contractor, to whom the performance of the duty is entrusted.” Restatement, *supra*, Introductory Note for §§ 416 to 429 at 394. This court has explained that a nondelegable duty

“‘means that an employer of an independent contractor . . . by assigning work consequent to a duty, is not relieved from liability arising from the delegated duties negligently performed. [Citation omitted.] As a result of a nondelegable duty, the responsibility or ultimate liability for proper performance of a duty cannot be delegated, although actual performance of the task required by a nondelegable duty may be done by another.’”

Long v. Hacker, 246 Neb. 547, 555, 520 N.W.2d 195, 201 (1994) (quoting *Swierczek v. Lynch*, 237 Neb. 469, 466 N.W.2d 512 (1991), and *Foltz v. Northwestern Bell Tel. Co.*, 221 Neb. 201, 376 N.W.2d 301 (1985)). Thus, the person owing a nondelegable duty “is not excused from taking the necessary precautions by contracting with or relying on others to take necessary precautionary measures.” *Hickman v. Parks Construction Co.*, 162 Neb. 461, 470, 76 N.W.2d 403, 410 (1956).

[7] While this court has previously determined that duties owed by the principal surgeon are nondelegable, it has not had occasion to determine whether duties owed by an anesthesiologist are nondelegable. However, the rationale behind nondelegable duties does not limit their application to principal surgeons, since the determination of whether a particular duty is nondelegable is a question of law which ultimately rests on policy considerations. *Kleman v. Rheingold*, 81 N.Y.2d 270, 614 N.E.2d 712, 598 N.Y.S.2d 149 (1993); *Saiz v. Belen School Dist.*, 113 N.M. 387,

827 P.2d 102 (1992); *Summers v. A.L. Gilbert Co.*, 69 Cal. App. 4th 1155, 82 Cal. Rptr. 2d 162 (1999).

[8,9] This court has stated that the risk reasonably to be perceived defines the duty to be obeyed. *Knoll v. Board of Regents*, 258 Neb. 1, 601 N.W.2d 757 (1999). The experts in this case would appear to agree that “significant” symptoms which put one’s patient at risk should be known by the anesthesiologist prior to commencing anesthesia. The disagreement lies in the acceptable manner in which such information is made known to the anesthesiologist. Given the inherent risks of anesthesia, it is reasonable for a patient to assume that medical information significant to a determination of whether the patient can be safely anesthetized will be known by the anesthesiologist before the patient receives anesthesia. “Under established principles, the client’s reasonable expectations and beliefs about who will render a particular service are a significant factor in identifying duties that should be deemed to be ‘nondelegable.’” *Kleeman*, 81 N.Y.2d at 276, 614 N.E.2d at 716, 598 N.Y.S.2d at 153. Accord Restatement (Second) of Torts § 429 (1965).

[10] We therefore determine that because a patient can sustain severe injuries and even death if anesthesia is not administered properly, public interest warrants the imposition of a nondelegable duty upon an anesthesiologist to be aware of reasonably available medical information significant to the health of his or her patient prior to administering anesthesia. *Kleeman*, *supra*; *Feliberty v. Damon*, 72 N.Y.2d 112, 527 N.E.2d 261, 531 N.Y.S.2d 778 (1988); *Funk v General Motors Corp.*, 392 Mich. 91, 220 N.W.2d 641 (1974), *abrogated on other grounds*, *Hardy v Monsanto Enviro-Chem*, 414 Mich. 29, 323 N.W.2d 270 (1982). Such duty is an integral part of the care the anesthesiologist delivers, and he or she should not be able to avoid the responsibility for the proper performance of such duty by delegating it to others.

[11] The appropriate standard of care in a medical malpractice action is a question of fact. See *Burns v. Metz*, 245 Neb. 428, 513 N.W.2d 505 (1994). If, on retrial, the standard of care is ultimately found to be one which delegates to others the responsibility for reporting to the anesthesiologist reasonably available medical information significant to the health of the patient, the anesthesiologist is not relieved from liability if the finder of fact

determines the delegated duties were performed negligently. *Long v. Hacker*, 246 Neb. 547, 520 N.W.2d 195 (1994).

Tendered jury instruction No. 12A is both a correct statement of the law and warranted by the evidence. In essence, the tendered instruction informed the jury that an anesthesiologist who delegates to others the responsibility for reporting to him or her reasonably available medical information significant to the health of the patient prior to the patient's undergoing anesthesia is not relieved from liability if the delegated responsibility is done negligently.

(b) Prejudice

The failure to give the Breedens' tendered jury instruction No. 12A was prejudicial. The jury was instructed, inter alia, that the Breedens claimed Anesthesia West, through its employees Dr. Hubka and Lemonds, breached the standard of care by "[f]ailing to read the nursing notes between the time that its employee, Douglas E. Rennels, M.D., performed the pre-anesthetic evaluation and that [sic] when Wesley K. Hubka, M.D. and Janet Lemonds performed their anesthetic duties." The jury was also instructed that "[t]he defendants further allege that the cause of plaintiffs' injuries and damages, if any, was something other than the alleged action or inaction of the defendants."

Anesthesia West asserted in closing argument that under the prevailing standard of care, neither Dr. Hubka nor Lemonds was required to be aware of the information in the nurses' notes unless such information was verbally brought to their attention. Anesthesia West's counsel argued, "Ladies and gentlemen, what is the standard of care? . . . The standard of care is to verbally pass along the information. . . . It's verbal communication. That's how it's done in this case. The plaintiff has not met the burden on standard of care."

In the absence of the Breedens' tendered instruction No. 12A, the jury was free to find that if the standard of care permitted Anesthesia West to delegate to others the responsibility of bringing to its attention reasonably available medical information significant to Breeden's health, Anesthesia West was relieved of liability even if the party to whom the responsibility was delegated performed that responsibility negligently. The district court's

failure to give the Breedens' tendered instruction No. 12A was prejudicial and necessitates reversal.

Having determined that the trial court's failure to give the Breedens' tendered instruction No. 12A requires reversal, we limit our consideration of the Breedens' remaining assignments of error to issues likely to arise again on retrial. See *Pleiss v. Barnes*, 260 Neb. 770, 619 N.W.2d 825 (2000).

2. JURY INSTRUCTION NO. 9

The Breedens assign that the district court erred in several respects regarding instruction No. 9. We address but one such contention. Instruction No. 9 provided:

This is an action based upon a claim of malpractice, sometimes called professional negligence. A statute of the State of Nebraska provides:

"Malpractice or professional negligence shall mean that, in rendering professional services, a health care provider has failed to use the ordinary and reasonable care, skill, and knowledge ordinarily possessed and used under like circumstances by members of his profession engaged in a similar practice in this or in similar localities. In determining what constitutes reasonable and ordinary care, skill, and diligence on the part of the health care provider in a particular community, the test shall be that which healthcare providers in the community or in similar communities and engaged in the same or similar lines of work, would ordinarily exercise and devote to the benefit of their patients under like circumstances."

We are here concerned with a highly specialized field with which laymen cannot be expected to be familiar. Accordingly, the standard of care of the required skill and knowledge to be exercised must necessarily be established by expert witnesses who are learned in the field of medicine. You must not, therefore, arbitrarily set your own standards, but you should determine the standard of care or required skill and knowledge from the testimony of the expert witness[es] who testified in this case.

The defendants in this case are health care providers under the terms of the foregoing statute.

Before discussing the merits of the Breedens' assigned errors with respect to instruction No. 9, we first address Anesthesia West's contention that the Breedens waived any objection to instruction No. 9 because they did not offer an alternative jury instruction. In support of this contention, Anesthesia West relies upon *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998), and *State v. Al-Zubaidy*, 253 Neb. 357, 570 N.W.2d 713 (1997).

Appellants in both *Lotter* and *Al-Zubaidy* assigned as error the trial court's failure to give a requested jury instruction. In both cases, we did not consider the assigned error because appellant had failed to request that the trial court give the instruction in question. We held that "[a] party who does not request a desired jury instruction cannot complain on appeal about incomplete instructions." *Lotter*, 255 Neb. at 508, 586 N.W.2d at 628. Accord *Al-Zubaidy*, *supra*.

[12] Neither *Lotter* nor *Al-Zubaidy* is applicable to the Breedens' assignments of error regarding instruction No. 9. Unlike *Lotter* and *Al-Zubaidy*, the Breedens have assigned as error an instruction given, rather than the court's failure to give a requested instruction. The record reflects that the Breedens timely objected to instruction No. 9 at the jury instruction conference. Such objection preserved the Breedens' objection to instruction No. 9 for purposes of this appeal. In order to appeal a jury instruction, an objection to the proposed instruction must be made at the trial level. *Suburban Air Freight v. Aust*, 262 Neb. 908, 636 N.W.2d 629 (2001); *Nelson v. Lusterstone Surfacing Co.*, 258 Neb. 678, 605 N.W.2d 136 (2000). Therefore, contrary to Anesthesia West's contention, the Breedens' assignment of error regarding instruction No. 9 is properly before the court. We therefore consider one of the Breedens' contentions regarding instruction No. 9, which is likely to arise on retrial.

The Breedens contend that instruction No. 9, *inter alia*, erroneously required them to prove the applicable standard of care solely through expert testimony. Whether the jury instructions given by a trial court are correct is a question of law. *Malone v. American Bus. Info.*, 264 Neb. 127, 647 N.W.2d 569 (2002); *Springer v. Bohling*, 263 Neb. 802, 643 N.W.2d 386 (2002).

The portion of instruction No. 9 regarding the standard of care provided:

We are here concerned with a highly specialized field with which laymen cannot be expected to be familiar. Accordingly, the standard of care of the required skill and knowledge to be exercised must necessarily be established by expert witnesses who are learned in the field of medicine. You must not, therefore, arbitrarily set your own standards, but *you should determine the standard of care or required skill and knowledge from the testimony of the expert witness[es] who testified in this case.*

(Emphasis supplied.)

[13] This portion of instruction No. 9 was an accurate statement of the longstanding rule that except in exceptional cases, each element of a claim of medical malpractice must be proved through expert testimony. See, *Fossett v. Board of Regents*, 258 Neb. 703, 605 N.W.2d 465 (2000); *McLaughlin v. Hellbusch*, 256 Neb. 615, 591 N.W.2d 569 (1999). The Breedens argue, however, that with the adoption of the “learned treatise” exception to the hearsay rule, Neb. Rev. Stat. § 27-803(17) (Cum. Supp. 2002), an exception to the expert testimony requirement regarding proof of the standard of care should be recognized. The Breedens contend that instruction No. 9 in effect “instructed the jury to disregard the evidence contained in the ‘Learned Treatises’ since it was not the testimony of the expert witness.” Brief for appellants at 40.

Under § 27-803,

[t]he following [is] not excluded by the hearsay rule, even though the declarant is available as a witness:

...
(17) Statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice, to the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination. If admitted, the statements may be read into evidence but may not be received as exhibits.

[14] This court has not had occasion to construe § 27-803(17). Since § 27-803(17) is, however, substantially similar to Fed. R.

Evid. 803(18), we will look to federal decisions interpreting Fed. R. Evid. 803(18) for guidance in construing § 27-803(17). Where a Nebraska Evidence Rule is substantially similar to a corresponding federal rule of evidence, Nebraska courts will look to federal decisions interpreting the corresponding federal rule for guidance in construing the Nebraska rule. *Maresh v. State*, 241 Neb. 496, 489 N.W.2d 298 (1992). See, also, *State v. Johnson*, 220 Neb. 392, 370 N.W.2d 136 (1985), *abrogated on other grounds*, *State v. Morris*, 251 Neb. 23, 554 N.W.2d 627 (1996).

In *Tart v. McGann*, 697 F.2d 75, 78 (2d Cir. 1982), the court held that Fed. R. Evid. 803(18) permits the admission of learned treatises as substantive evidence “‘to the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination,’” and only “as long as it is established that such literature is authoritative.” The court explained that while rule 803(18) permits the admission of learned treatises as substantive evidence, learned treatises are not admissible independently of expert testimony:

Prior to the enactment of Rule 803(18), learned treatises were generally usable only on cross-examination, and then only for impeachment purposes. [Citation omitted.] Most commentators found the hearsay objections to learned treatise evidence unconvincing, and recommended that treatises be admitted as substantive evidence. Some commentators went so far as to suggest that treatises be admitted independently of an expert’s testimony. [Citation omitted.] The Advisory Committee rejected this position, noting that a treatise might be “misunderstood and misapplied without expert assistance and supervision.” . . . Accordingly, the Rule permits the admission of learned treatises as substantive evidence, but only when “an expert is on the stand and available to explain and assist in the application of the treatise”

Tart, 697 F.2d at 78 (quoting Fed. R. Evid. 803(18) advisory committee notes).

We find the reasoning of the Second Circuit in *Tart*, *supra*, persuasive. In the instant case, excerpts from each of three treatises were read by Dr. Fields during his direct examination testimony. Such excerpts, which were established as authoritative, provided

substantive evidence of the standard of care because Dr. Fields was “‘on the stand and available to explain and assist in the application of the treatise[s].’” See *Tart*, 697 F.2d at 78. The learned treatises, however, were a part of Dr. Fields’ testimony, and as such, we find no merit in the Breedens’ contention that the district court erred in instructing the jury to determine the standard of care “from the testimony of the expert witness[es] who testified in this case.”

[15,16] Additionally, we find no merit in the Breedens’ contention that § 27-803(17) creates an exception to the expert testimony requirement in medical malpractice cases. Pursuant to § 27-803(17), learned treatises which have been established as a reliable authority are admissible into evidence only “to the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination.” Thus, duly admitted learned treatises do not independently establish the standard of care in a medical malpractice action. They are merely evidence of the standard of care to the extent relied upon by the expert witness in direct examination, or called to the attention of the expert witness upon cross-examination. § 27-803(17); *Tart*, *supra*. See, also, *Morlino v. Medical Center*, 152 N.J. 563, 706 A.2d 721 (1998). But see *Wilson v. Knight*, 26 Kan. App. 2d 226, 229, 982 P.2d 400, 403 (1999) (noting that Kansas’ learned treatise rule is “unique” since it permits “the admission into evidence of a medical treatise as independent substantive evidence” of the standard of care). The Breedens’ assigned error is without merit.

3. REMAINING ASSIGNMENTS OF ERROR

Since our conclusion requires that we reverse, and remand this matter for a new trial, we find it unnecessary to further address the Breedens’ arguments with respect to instruction No. 9 or their remaining assignments of error.

VII. CROSS-APPEAL

Anesthesia West assigns on cross-appeal that the district court erred in ruling as a matter of law that the inconsistent statements made by Clark constituted changed testimony for the exigencies of trial pursuant to *Momsen v. Nebraska Methodist Hospital*, 210 Neb. 45, 313 N.W.2d 208 (1981). Anesthesia West further

assigns error in incorporating such pretrial ruling into jury instruction No. 5. Whether the jury instructions given by a trial court are correct is a question of law. *Malone v. American Bus. Info.*, 264 Neb. 127, 647 N.W.2d 569 (2002); *Springer v. Bohling*, 263 Neb. 802, 643 N.W.2d 386 (2002). When reviewing questions of law, an appellate court has an obligation to resolve the question independently of the conclusion reached by the trial court. *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001).

Clark testified in her initial deposition that she entered the note describing Michael Breeden's "tingling" symptom into Breeden's electronic file at 9:50 a.m. on August 16, 1994, prior to Breeden's surgery. However, in her second deposition, Clark testified she might have entered the note later in the day after Breeden's surgery:

Q. [by Anesthesia West's counsel] [The notation of time on the nursing note is] not necessarily the moment that you're at the computer putting the note in; true?

A. Correct.

Q. And the computer doesn't print out a time which shows the moment that you were at the computer keyboard making the time entry; true?

A. Not to my knowledge.

Q. And you chart symptoms when you have the opportunity to do so; correct?

A. Yes.

Q. And sometimes you might chart it later in the day when you have the time, but you'll refer back to the time that the observation was made in the note; true?

A. There are times.

Q. That's — What you're supposed to do is list the time that something happened, as best you can estimate it or list it; true?

A. Yes.

Q. And that may be different than the time that you're actually at the keyboard; true?

A. There are times.

Prior to trial, the district court ruled, over Anesthesia West's objection, that under the rule enunciated in *Momsen, supra*,

Clark's "earlier deposition which indicates that the entry was made at a time on or before the day of surgery or the specific words of her own testimony will be the testimony at trial as a matter of law." Such determination was incorporated into jury instruction No. 5, which provided that "[t]he Court has determined as a matter of law that the following fact exists and you must accept it as true: Nurse Joyce Clark entered her nursing note on the computer at 9:50 a.m. on August 16, 1994."

In *Momsen*, a defendant doctor made statements during a pre-trial deposition which in effect admitted his negligence. However, during trial, he testified to new facts which contradicted his earlier statements. On appeal, this court considered "whether, under the circumstances of this case, the [doctor's deposition] admissions bind him or simply go to the issue of his credibility." *Momsen v. Nebraska Methodist Hospital*, 210 Neb. 45, 53, 313 N.W.2d 208, 212 (1981). We determined that a party who changes his or her testimony during the course of litigation is bound by his or her earlier statements upon proof "that the testimony pertains to a vital point, that it is clearly apparent the party has made the change to meet the exigencies of the pending case, and that there is no rational or sufficient explanation for the change in testimony." *Id.* at 55, 313 N.W.2d at 213. See, also, *Neill v. Hemphill*, 258 Neb. 949, 607 N.W.2d 500 (2000). Accordingly, we held that the doctor was bound by his earlier deposition testimony, since the changed testimony concerned the central issue of the doctor's negligence, it was clear the doctor deliberately changed his testimony to meet the exigencies of the trial, and the doctor could not explain the change in his testimony. *Momsen, supra*.

[17] This court has specifically declined to extend *Momsen, supra*, to instances of changed testimony by nonparty witnesses. *Ketteler v. Daniel*, 251 Neb. 287, 556 N.W.2d 623 (1996). A non-party witness' changed testimony, even if made without reasonable explanation and in order to meet the exigencies of pending litigation, "is a factor to be considered by the jury when determining the weight and credibility to be given the witness' testimony." *Id.* at 295, 556 N.W.2d at 628. See, also, *State v. Osborn*, 241 Neb. 424, 490 N.W.2d 160 (1992); *State v. Robertson*, 223 Neb. 825, 394 N.W.2d 635 (1986). We again decline to extend *Momsen* to nonparty witnesses.

Since *Momsen, supra*, does not apply to nonparty witnesses, the district court erred in giving jury instruction No. 5.

VIII. CONCLUSION

For the reasons stated herein, the matter is reversed, and the cause is remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

IN RE INTEREST OF JOSHUA R. ET AL.,
CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, v.
ANGELA R., APPELLANT.
657 N.W.2d 209

Filed February 28, 2003. Nos. S-02-253 through S-02-257.

1. **Juvenile Courts: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings.
2. **Evidence: Appeal and Error.** When the evidence is in conflict, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.
3. **Parental Rights: Evidence: Proof.** Before parental rights may be terminated, the evidence must clearly and convincingly establish the existence of one or more of the statutory grounds permitting termination and that termination is in the juvenile's best interests.
4. **Juvenile Courts.** Juvenile proceedings are civil rather than criminal in nature.
5. **Right to Counsel.** An individual has no constitutional right to effective assistance of counsel in a civil proceeding.
6. **Parental Rights: Due Process.** Due process is required in cases involving termination of parental rights.
7. **Parental Rights.** Children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity.

Appeals from the County Court for York County: CURTIS H. EVANS, Judge. Affirmed.

Robert B. Creager and Jonathan M. Braaten, of Anderson, Creager & Wittstruck, P.C., for appellant.

Randy R. Stoll, York County Attorney, for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

On January 31, 2002, the York County Court, sitting as a juvenile court, entered an order terminating the parental rights of Angela R. to her five minor children, Joshua R., Glorianna R., Shaughnessy R., deChelly R., and Desmarais R., pursuant to Neb. Rev. Stat. § 43-292(2), (6), and (7) (Reissue 1998). In these consolidated cases, Angela appeals the termination of her parental rights. We affirm.

STATEMENT OF FACTS

Angela is the natural mother of the following five minor girls: Joshua, born on August 30, 1988; Glorianna, born on May 27, 1990; Shaughnessy, born on July 24, 1997; deChelly, born on July 24, 1998; and Desmarais, born on November 8, 1999. Angela is also the mother of a son who evidently died of an asthma attack in 1996 at the age of 10 and a daughter who was born after Desmarais and is not subject to these proceedings. According to the record, the five children in these proceedings have four different fathers, none of whom are parties to these appellate proceedings.

On November 30, 1999, all five children were removed from Angela's care and placed in protective custody with the Nebraska Department of Health and Human Services (DHHS) by the York Police Department due to allegations of neglect and lack of proper parental care. All five children have remained in foster care in the custody of DHHS since that date.

On December 1, 1999, five separate petitions were filed, one as to each of the above-named children, alleging that the subject child was a juvenile as described under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1998). The five proceedings were consolidated below and on appeal. An adjudication hearing was held on December 16. In the court's December 17 order, each child was adjudicated a juvenile within the meaning of § 43-247(3)(a). The court made numerous findings, including the following:

[O]n November 24th, 1999, Officer Roger Wolfe of the York Police Department went to [Angela's] residence . . .

at about 1:15 p.m. The Officer entered the house It was obvious to the Officer that the family was just getting out of bed The Officer asked [Angela] why Glorianna . . . was not in school that day. [Angela] advised the Officer that Joshua was supposed to go to the doctor that afternoon . . . and that the school knew about that. [The Officer] then contacted the school and was advised that the school had no idea why the child was not in school. The Officer was advised that Glorianna and Joshua missed the bus.

. . . .
The Officer and a [DHHS] representative . . . went to the home to check on the two younger children on November 29, 1999. They determined from the school that Joshua . . . had been taken out [of] school to go to the Clinic. The Officers [sic] found Joshua . . . at the Clinic waiting alone. The time period is disputed between [the] parties, but in any event [Joshua] was left alone for a period of time.

Glorianna and Joshua . . . were interviewed. They indicated that they did most of the housework at their home and mixed all of the formula prior to going to bed at night. . . .

The Officer determined that Joshua . . . had missed sixteen days of school during the current year all of which were unexcused absences. [Angela] advised the Officer that it was because the girls missed the bus ast [sic] they didn't get out there in time. [Angela] didn't feel that it was her problem that the children were not making the bus in time. . . .

The Juveniles indicated that they rarely eat breakfast except on days that they don't have school. They also indicated that when they have school, the only meal that is served in the home is served late in the evening.

When [a DHHS worker] checked Desmarais she found the juvenile had a terrible diaper rash. . . . Desmarais was five and half pounds at birth and one month later is now six pounds.

Based upon these and other factual findings as to each juvenile, the court adjudicated the five children. Angela did not appeal the adjudication order.

A hearing was held on January 27, 2000, and a disposition order was entered on February 7, setting forth a rehabilitation

plan for Angela and spelling out a number of goals, which can be summarized as including attending mental health counseling, acquiring anger management skills, acquiring parenting skills, and improving finances. The permanency objective was reunification. Angela did not appeal the disposition order establishing the rehabilitation plan. Periodic dispositional hearings were held. In orders filed on May 24 and December 15, the court continued the original plan and goals with minor changes.

A permanency hearing was held on December 13, 2000, and continued on January 18 and February 13, 2001. In an order filed on April 26, the court determined that based upon the evidence presented at the hearing, which included testimony from a family support worker and the DHHS caseworker assigned to the children, it was “inappropriate to continue to consider reunification with [Angela] and that the proper permanency plan [was for] the state [to file] a petition for termination of parental rights as to each of the [children].” The court concluded that “after more than 15 months, [Angela had] failed to show that she can or will acknowledge the situation or that she would cooperate in a reasonable way to solve the problems which brought about the cases concerning [the children].”

On May 29, 2001, Angela filed a notice of appeal in each of the cases, seeking to appeal the court’s April 26 order changing the permanency objective from reunification to termination of parental rights. The Nebraska Court of Appeals dismissed the appeals as untimely, having been filed more than 30 days after the entry of the order appealed from. See *In re Interest of DeChelly R. et al.*, 10 Neb. App. xlv (Nos. A-01-685 through A-01-689, July 31, 2001).

On May 17, 2001, the State filed motions for termination of parental rights in each of the five children’s proceedings. The motions were essentially identical, and each sought termination of Angela’s parental rights under § 43-292(2), (4), (6), and (7). The motions also asserted that termination of parental rights was in each of the children’s best interests.

Section 43-292(2) requires a finding that the parent has substantially and continuously or repeatedly neglected or refused to give the juvenile or a sibling of the juvenile necessary parental care and protection. Section 43-292(4) requires a finding that the

parent is unfit by reason of conduct which is seriously detrimental to the health, morals, or well-being of the juvenile. Section 43-292(6) requires a finding that following a determination that the juvenile is one as described in § 43-247(3)(a), reasonable efforts to preserve and unify the family under the direction of the court have failed to correct the conditions leading to the determination. Section 43-292(7) requires a finding that the juvenile has been in out-of-home placement for 15 or more of the most recent 22 months.

On December 20, 2001, and continuing on December 21, the State's motions for termination came on for hearing. Angela was present and represented by counsel. A total of 13 witnesses testified. Documentary evidence was received. Several witnesses testified on behalf of the State, including the children's DHHS caseworker; Angela's mental health therapist; and a family support worker. In general, the State's evidence can be summarized as establishing that Angela failed to attend therapy, was inattentive to her children during visits, and seemed unconcerned with matters concerning the children's health and welfare. One witness testified that Angela did not demonstrate a consistent pattern of behavior, discipline, or structure during her visits with her children. The State introduced evidence that during meetings with her children, Angela became distracted, and that her attention would frequently have to be redirected to her children.

Evidence was introduced with regard to each child, some of which we summarize below. The record reflects that Joshua has been diagnosed with "Post Traumatic Stress Disorder" and has a history of "Oppositional Defiant Disorder." Joshua's therapist testified that Joshua is intelligent, but when she became negative or depressed, her performance in her schoolwork went from an "A" to an "F." According to the therapist, Joshua reacted to adverse situations with anger, had issues with trust, tended to isolate herself, and had poor decisionmaking skills. Glorianna was described by a witness as being very bright but suffering from disorganization and an inability to stay on task, which characteristics were more severe than those typically exhibited by adolescents. Evidence was also adduced that both Joshua and Glorianna had been abused in the past by one of Angela's

boyfriends and that both girls had been removed from Angela's custody and placed under DHHS' care and supervision on three prior occasions.

With regard to Shaughnessy, the record reflects that she suffers from a hearing deficiency. According to evidence received by the court during the termination hearing, Shaughnessy was examined by a doctor on January 19, 2000, shortly after she was taken from Angela's custody. Shaughnessy was "found to have cockroaches embedded in her ears," and the cockroaches were subsequently removed. The doctor believed this condition may have led to Shaughnessy's hearing deficiency. As a result of her hearing deficiency, Shaughnessy suffers from substantial developmental problems. Her speech and gross motor skills are impaired, and she has been characterized as requiring a great deal of individual attention and care.

With regard to deChelly, the record reflects that Angela fails to relate to this child. For example, during deChelly's visits with Angela, Angela would ignore the child's requests to use the restroom, relying on support workers to take deChelly to the bathroom. On one occasion, Angela failed to react when the child followed an older sister into the street. A support worker had to respond and stop deChelly.

With regard to Desmarais, the youngest child subject to these proceedings, evidence introduced during the termination hearing indicated that when Desmarais was initially taken into custody, she was 1-month old and weighed 6 pounds. Approximately 6 weeks after she was removed from Angela's care, her weight had almost doubled. Desmarais' caseworker reported that when Desmarais was born, "she 'just shook from nicotine withdrawals.'"

Invoking the language of § 43-292, in a written order filed January 31, 2002, the court found that the State had proved by clear and convincing evidence the grounds for termination set forth in § 43-292(2), (6), and (7). The court further found that it was in the children's best interests that Angela's parental rights be terminated. Accordingly, the court terminated Angela's parental rights to Joshua, Glorianna, Shaughnessy, deChelly, and Desmarais. Angela appeals.

ASSIGNMENTS OF ERROR

On appeal, Angela asserts several assignments of error, which we restate as four. Angela asserts, renumbered and restated, that (1) she was denied due process by virtue of ineffective assistance of counsel as a result of trial counsel's failure to perfect an appeal of the April 26, 2001, order which changed the permanency objective from reunification to termination of parental rights, (2) the court erred in finding that the State proved by clear and convincing evidence under § 43-292(2) that Angela had substantially and continuously or repeatedly neglected and refused to give the children or a sibling of the children necessary parental care and protection, (3) the court erred in finding that the State proved by clear and convincing evidence under § 43-292(6) that reasonable efforts had failed to correct the conditions leading to the adjudication of the children, and (4) the court erred in finding that the State proved by clear and convincing evidence that termination of Angela's parental rights was in the children's best interests. We note that Angela does not dispute the court's finding that the children had been in out-of-home placement "since November 30th, 1999," which fact would serve as a factual basis for termination under § 43-292(7). In our analysis, we consider assignments of error Nos. 2, 3, and 4 together.

STANDARDS OF REVIEW

[1-3] Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. *In re Interest of Ty M. & Devon M.*, ante p. 150, 655 N.W.2d 672 (2003); *In re Interest of Phyllisa B.*, ante p. 53, 654 N.W.2d 738 (2002). When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other. *Id.* Before parental rights may be terminated, the evidence must clearly and convincingly establish the existence of one or more of the statutory grounds permitting termination and that termination is in the juvenile's best interests. *In re Interest of Phyllisa B.*, supra.

ANALYSIS

Due Process and “Effective Assistance of Counsel.”

On appeal, Angela claims generally that she was denied due process by virtue of ineffective assistance of counsel. Her specific complaint relates to her trial attorney’s failure to properly appeal from the court’s April 26, 2001, order changing the permanency objective from reunification to termination of parental rights. Assuming without deciding that the April 26 order was an appealable order, see *In re Guardianship of Rebecca B. et al.*, 260 Neb. 922, 621 N.W.2d 289 (2000), and *In re Interest of Sarah K.*, 258 Neb. 52, 601 N.W.2d 780 (1999), we conclude that Angela was not denied due process, and accordingly, we find no merit to this assignment of error.

In support of her assignment of error, Angela notes that she was entitled to have counsel represent her in these juvenile proceedings under Neb. Rev. Stat. § 43-279.01(1)(b) (Reissue 1998), and because she is statutorily entitled to counsel, Angela asserts that it “necessarily follows” that such counsel should provide effective assistance and that she was denied due process by virtue of her trial attorney’s failure to properly appeal. Brief for appellant at 32. Section 43-279.01 provides in pertinent part as follows:

(1) When the petition alleges the juvenile to be within the provisions of subdivision (3)(a) of section 43-247 or when termination of parental rights is sought pursuant to subdivision (6) or (7) of section 43-247 and the parent or custodian appears with or without counsel, the court shall inform the parties of the:

....

(b) Right to engage counsel of their choice at their own expense or to have counsel appointed if unable to afford to hire a lawyer.

[4-6] Initially, we observe that juvenile proceedings are civil rather than criminal in nature, see *In re Interest of Destiny S.*, 263 Neb. 255, 639 N.W.2d 400 (2002), and that we have previously stated that an individual has no constitutional right to effective assistance of counsel in a civil proceeding, *Ernest v. Jensen*, 226 Neb. 759, 415 N.W.2d 121 (1987) (civil action involving license revocation). See, also, *State v. Gray*, 259 Neb. 897, 612 N.W.2d

507 (2000) (civil action involving petition for postconviction relief). In addition, we have ruled that a statutory right to the appointment of counsel does not give rise to an ineffective assistance of counsel claim in a civil postconviction case. See *State v. Becerra*, 263 Neb. 753, 642 N.W.2d 143 (2002). We have, however, acknowledged that due process is required in cases involving termination of parental rights, and we analyze Angela's claim under due process principles.

We have recently addressed a parent's due process rights during termination proceedings. In *In re Interest of Ty M. & Devon M.*, ante p. 150, 158, 655 N.W.2d 672, 681 (2003), we stated: "[S]tate intervention to terminate the parent-child relationship must be accomplished by procedures meeting the requisites of the Due Process Clause." (Quoting with approval *In re Interest of Kantril P. & Chenelle P.*, 257 Neb. 450, 598 N.W.2d 729 (1999)). We also recognized:

"Procedural due process includes notice to the person whose right is affected by the proceeding; reasonable opportunity to refute or defend against the charge or accusation; reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation; representation by counsel, when such representation is required by the Constitution or statutes; and a hearing before an impartial decisionmaker."

In re Interest of Ty M. & Devon M., ante at 158, 655 N.W.2d at 681 (quoting *In re Interest of Kelley D. & Heather D.*, 256 Neb. 465, 590 N.W.2d 392 (1999)).

In the instant case, Angela claims in effect that because her counsel filed an untimely appeal of the court's order changing the permanency objective from reunification to termination of parental rights, she was denied due process. Angela's argument ignores, however, that she was given notice and a full opportunity to litigate the issue of the termination of her parental rights when the State's termination motions came on for trial on December 20 and 21, 2001.

The record reflects that Angela received proper notice of the termination hearing and that during the 2-day termination hearing, Angela appeared and was represented by counsel. Angela's counsel introduced evidence and cross-examined witnesses on

Angela's behalf. The record further reflects that Angela testified at the hearing in opposition to the State's motions to terminate parental rights. Finally, following the hearing, the court issued an eight-page order, detailing the court's findings of fact and conclusions of law with regard to the State's motions and determining that the State had proved by clear and convincing evidence that the grounds for termination set forth in § 43-292(2), (6), and (7) had been established as to each child. Based on this record, we conclude that Angela was afforded due process. See *In re Interest of Ty M. & Devon M.*, *supra*. This assignment of error is without merit.

Statutory Basis for Termination of Parental Rights and Best Interests.

The court found that three of the grounds for termination alleged in the State's motions, § 43-292(2), (6), and (7), were proved by the State. The court concluded that the evidence did not support the State's allegation that Angela's parental rights should be terminated pursuant to § 43-292(4). Angela challenges the court's determinations that the State had established statutory bases for termination of her parental rights and further challenges the court's conclusion that termination is in the children's best interests. We find no merit to these arguments.

In order to terminate parental rights, the State must prove by clear and convincing evidence that one of the statutory grounds enumerated in § 43-292 exists and that termination is in the child's best interests. *In re Interest of Phyllisa B.*, *ante* p. 53, 654 N.W.2d 738 (2002); *In re Interest of DeWayne G. & Devon G.*, 263 Neb. 43, 638 N.W.2d 510 (2002); *In re Interest of Clifford M. et al.*, 261 Neb. 862, 626 N.W.2d 549 (2001). Because we conclude below that the propriety of termination of Angela's parental rights was sufficiently demonstrated pursuant to § 43-292(7), and we affirm on the basis of § 43-292(7), we need not consider Angela's assigned errors relating to the sufficiency of evidence under other statutory provisions identified by the court as grounds for termination of her parental rights. See, *In re Interest of DeWayne G. & Devon G.*, *supra*; *In re Interest of Lisa W. & Samantha W.*, 258 Neb. 914, 606 N.W.2d 804 (2000).

The record reflects and Angela does not dispute that at the time of the termination hearing, all five of the children had been in continuous foster care for approximately 24 months, thereby satisfying the requirement under § 43-292(7) that they be in out-of-home placement for 15 of the last 22 months. The remaining issue is whether terminating Angela's parental rights is in the children's best interests.

In its December 17, 1999, order, the court determined that the children were juveniles within the meaning of § 43-247(3)(a). Due to Angela's inability to parent, the children's safety was in danger, and the court determined that the children were at risk, adjudicated the children, and ordered that the children should remain in DHHS' care and custody. Following the adjudication, in an order filed on February 7, 2000, the court approved a rehabilitation plan for Angela, which plan spelled out a number of goals for Angela, including attending mental health counseling, acquiring anger management skills, acquiring parenting skills, and improving finances. A dispositional order imposing a rehabilitation plan for parents in a juvenile case is a final, appealable order. *In re Interest of Tabatha R.*, 255 Neb. 818, 587 N.W.2d 109 (1998). Angela did not appeal the court's February 7 order. In subsequent orders, the court continued with the original rehabilitation plan and goals with minor changes. Eventually, the objective of the plan was changed from reunification to termination.

The obvious objective of the rehabilitation plan was to correct the deficiencies in parenting exhibited by Angela, which corrections would benefit the children. However, the record reflects that Angela failed to demonstrate improvement. For example, although individual therapy was made available to Angela, the record reflects that in 2000, she attended 15 percent of her scheduled counseling appointments, and in 2001, she failed to attend any appointments. In this connection, the court found that Angela "had failed to use . . . therapy to address the issue of her family" and that thus, Angela's ability to establish a healthy relationship with her children had not improved.

With respect to the financial support required to provide for her children, the record shows that Angela worked for five different employers in 2000 and three different employers in 2001. Her total earnings in 2000 were \$4,162.51, and in 2001, she earned

\$1,611.50. The court concluded that Angela had not shown an ability to keep steady employment and that thus, Angela had failed to demonstrate that she could provide basic financial support for her children.

During the period of time the children were removed from Angela's care, the record shows that Angela failed to improve her parenting skills. In 2001, Angela attended 29 percent of her scheduled visits with the children. The visits were held outside of Angela's residence due to unsanitary conditions, and during such visits, Angela was unable or unwilling to supervise or care for the children. According to the record, agency workers who accompanied the children on their visits with Angela found it necessary to

continue to provide for the safety of the children during visitation. The workers also report[ed] Angela has demonstrated favoritism with her children. Joshua is talked to and Shaughnessy is played with. [Glorianna] will beg for attention and [Angela] will ignore her. [Desmarais] is rarely held by Angela. . . . During visitation the workers will be the ones cutting up the food, assisting with feeding and providing drinks. Angela continue[d] to leave the visits for smoke breaks and using the phone. She often does not tell the workers, she just disappears.

The totality of the record shows that Angela is unable to provide basic parental care for her children.

[7] We have stated that children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity. *In re Interest of DeWayne G. & Devon G.*, 263 Neb. 43, 638 N.W.2d 510 (2002); *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997). Based upon the foregoing evidence, we conclude that the record clearly and convincingly shows that at the time of the termination hearing, Joshua, Glorianna, Shaughnessy, deChelly, and Desmarais had been in out-of-home placement for at least 15 of the most recent 22 months, and that termination of Angela's parental rights is in the children's best interests. Accordingly, we affirm the court's order terminating Angela's parental rights as to Joshua, Glorianna, Shaughnessy, deChelly, and Desmarais pursuant to § 43-292(7).

CONCLUSION

We conclude that Angela was not denied due process. Based upon our de novo review of the record, there is clear and convincing evidence that Angela's parental rights to Joshua, Glorianna, Shaughnessy, deChelly, and Desmarais should be terminated pursuant to § 43-292(7) and that such termination is in the children's best interests. Accordingly, the judgment of the county court terminating such rights is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
CLIFFORD J. DAVLIN, APPELLANT.
658 N.W.2d 1

Filed March 7, 2003. No. S-00-698.

1. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the factual findings of the district court will not be disturbed unless they are clearly erroneous.
2. **Effectiveness of Counsel: Appeal and Error.** Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact.
3. **Supreme Court: Courts: Appeal and Error.** The Nebraska Supreme Court, upon granting further review which results in the reversal of a decision of the Nebraska Court of Appeals, may consider, as it deems appropriate, some or all of the assignments of error the Court of Appeals did not reach.
4. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.
5. ____: _____. In order to show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
6. **Appeal and Error.** When an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition.
7. **Right to Counsel.** Once a defendant asking for substitute counsel has raised a seemingly substantial complaint about counsel, the court has a duty to thoroughly inquire into the complaint.
8. **Postconviction: Effectiveness of Counsel: Presumptions: Proof.** Under certain circumstances, the nature of counsel's deficient conduct in the context of the prior proceedings can lead to a presumption of prejudice, negating the defendant's need to offer evidence of actual prejudice in a postconviction case.

9. **Effectiveness of Counsel: Presumptions.** Prejudice may be presumed only when surrounding circumstances justify a presumption of ineffectiveness.
10. **Right to Counsel: Presumptions.** Prejudice is presumed where an accused is completely denied counsel at a critical stage of the proceedings.
11. **Effectiveness of Counsel: Presumptions.** Prejudice is presumed where counsel entirely fails to subject the prosecution's case to meaningful adversarial testing.

Petition for further review from the Nebraska Court of Appeals, HANNON, INBODY, and MOORE, Judges, on appeal thereto from the District Court for Sarpy County, RONALD E. REAGAN, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Peter K. Blakeslee, and, on brief, James R. Mowbray and Nancy K. Peterson, of the Nebraska Commission on Public Advocacy, for appellant.

Don Stenberg, Attorney General, J. Kirk Brown, and Marilyn B. Hutchinson for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

I. NATURE OF CASE

Clifford J. Davlin was convicted of first degree sexual assault on a child and use of a weapon to commit a felony. He was subsequently determined to be a habitual criminal and sentenced to a total of 25 to 35 years' imprisonment. Davlin's convictions and sentences were affirmed by memorandum opinion on direct appeal. See *State v. Davlin*, 3 Neb. App. xiii (No. A-94-505, Feb. 28, 1995).

Thereafter, Davlin filed a motion for postconviction relief, which the district court denied, and he appealed. The Nebraska Court of Appeals reversed the judgment and remanded the cause for a new trial, concluding that Davlin's due process rights were violated by the trial court's refusal to inquire into his dissatisfaction with court-appointed counsel. See *State v. Davlin*, 10 Neb. App. 866, 639 N.W.2d 168 (2002). We granted the State's petition for further review.

II. SCOPE OF REVIEW

[1] A defendant requesting postconviction relief must establish the basis for such relief, and the factual findings of the district court will not be disturbed unless they are clearly erroneous. See *State v. Becerra*, 263 Neb. 753, 642 N.W.2d 143 (2002).

[2] Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision. See, *id.*; *State v. White*, 246 Neb. 346, 518 N.W.2d 923 (1994).

III. FACTS

On November 20, 1993, 15-year-old M.D. left her home in Aurora, Nebraska, and hitchhiked to a truckstop near Lincoln. She took a taxi into Lincoln and eventually found herself walking down O Street as it was beginning to get dark. When a couple of males began chasing M.D. on O Street, Davlin pulled up in his car and asked M.D. if she needed a ride. M.D. told Davlin she was on her way to Omaha, and Davlin responded that he would take her there that night.

After M.D. got into Davlin's car, the two went to a Lincoln bar where Davlin bought alcoholic drinks for M.D. and himself. Davlin suggested to M.D. that she stay overnight at his apartment and that they would travel to Omaha the next morning. M.D. agreed, and the parties proceeded to Davlin's apartment, where M.D. showered and lay down to sleep on the couch. Three times during the night, Davlin stood naked in front of M.D., but she pretended to be asleep.

The next morning, Davlin and M.D. set out for Omaha. M.D. testified that they traveled on a highway and that they passed a sign for Syracuse and Nebraska City before turning off the highway onto a gravel road. Davlin stopped his car near an abandoned house and made an advance on M.D. She attempted to get out of the car, but Davlin wielded a knife, commanded M.D. to

get back into the car, and threatened to kill her if she got out. Davlin forced her to perform various sex acts, including fellatio and vaginal intercourse. He then drove M.D. to Bellevue and let her out of the car.

M.D. went to the nearest store and reported what had happened. A police officer arrived, and M.D. was taken to the hospital. The treating physician gave her a complete physical examination and took several samples for a sexual assault kit. M.D. reported pain in her lower abdomen, which the treating physician testified was consistent with aggressive sexual intercourse. M.D. then led a Sarpy County investigator to the site of the sexual assault and to Davlin's Lincoln apartment. A search warrant was obtained for Davlin's car and apartment. M.D. identified Davlin as being her assailant.

Davlin admitted to an investigating officer that he met M.D. on November 20, 1993, and took her to a bar and his apartment. He claimed that he drove M.D. to a truckstop west of Lincoln later that night. He denied having sexually assaulted M.D. He admitted keeping a knife in his car.

Davlin was charged with first degree sexual assault on a child and use of a weapon to commit a felony. The Sarpy County public defender was appointed to represent Davlin, and Davlin pled not guilty. On March 11, 1994, 3 days before trial, the trial court received a letter from Davlin, complaining about his representation by the public defender.

During a hearing on the State's motion to endorse witnesses, the trial court stated that it had received Davlin's four-page letter but that the court had not read the letter in its entirety and did not want to get into the content of the letter. Davlin was told that if the court discharged the public defender, another lawyer would not be appointed. Davlin chose to proceed to trial with the public defender as his counsel.

On March 15, 1994, a jury found Davlin guilty of first degree sexual assault on a child and use of a weapon to commit a felony. After an evidentiary hearing, the trial court found Davlin to be a habitual criminal, and he was sentenced to 25 to 35 years' imprisonment.

On direct appeal, Davlin was represented by an assistant public defender for Sarpy County. The Court of Appeals affirmed

the trial court's judgment by memorandum opinion. See *State v. Davlin*, 3 Neb. App. xiii (No. A-94-505, Feb. 28, 1995).

When Davlin filed his motion for postconviction relief, he was represented by attorneys from the Nebraska Commission on Public Advocacy. His operative motion alleged, inter alia, that the trial court (1) denied his right to due process of law and to effective assistance of counsel by denying his pretrial request for substitution of counsel and (2) denied his right to effective assistance of counsel at trial and on direct appeal.

In addition to the letter Davlin sent to the trial court, he testified by deposition that counsel had not met with him more than three times before trial. Although Davlin spoke with counsel via telephone on numerous occasions, counsel did not reply to letters from Davlin. After Davlin received certain laboratory reports, he asked for independent DNA testing. He claimed that counsel responded to his request with vulgar language, stating that counsel was not going to spend \$40,000 to prove Davlin's innocence.

Additionally, Davlin testified that he had asked the public defender to investigate the odometer reading on his car because he had recently purchased the car and believed that the odometer reading would have shown that he could not have driven the route which was alleged. He also asked counsel to have the car inspected for semen which was claimed to have been deposited in the car in relation to the sexual assault.

The State presented no evidence at the hearing on Davlin's motion for postconviction relief.

The district court found that the public defender's failure to act on Davlin's requests fell below the minimum standard and that counsel's response to Davlin's request for independent DNA testing lacked the civility that even the most difficult client should expect. However, the court concluded that Davlin had "failed to establish grounds for relief under the Strickland prongs." Having separately concluded that Davlin's complaints of ineffective assistance of counsel during trial and appeal were without merit, the district court denied the motion. Davlin timely appealed.

On appeal, Davlin made the following assignments of error: (1) He was denied effective assistance of counsel and due process in the trial court's disposition of his request for substitute counsel and (2) he was denied effective assistance of counsel at trial and

on direct appeal. He argued that the trial court's failure to inquire into the factual basis of his dissatisfaction with the public defender denied him the right to effective assistance of counsel. He claimed this failure violated his 6th Amendment right to effective representation and his right to due process of law under the 14th Amendment.

The Court of Appeals concluded that the failure of the trial court to inquire into Davlin's dissatisfaction with counsel was a denial of due process which required a new trial. It did not address Davlin's claims that his trial and appellate counsel were ineffective.

IV. ASSIGNMENTS OF ERROR

In its petition for further review, the State asserts that the Court of Appeals (1) erroneously announced a rule, previously unknown to Nebraska law, that the failure of a trial court to hold a hearing into a pro se defendant's ex parte complaints about appointed counsel represents a per se violation of the Due Process Clause and (2) erroneously concluded that the question of whether Davlin suffered any prejudice as a result of the relationship between appointed counsel and Davlin was irrelevant to an analysis of the question.

V. ANALYSIS

1. INEFFECTIVE ASSISTANCE OF COUNSEL

[3] We begin our analysis by addressing Davlin's claim that he was denied effective assistance of counsel at trial and on direct appeal. The Supreme Court, upon granting further review which results in the reversal of a decision of the Court of Appeals, may consider, as it deems appropriate, some or all of the assignments of error the Court of Appeals did not reach. *State v. Harrold*, 256 Neb. 829, 593 N.W.2d 299 (1999).

[4,5] Because Davlin was represented by the public defender's office at trial and on direct appeal, he is not procedurally barred from asserting a claim of ineffective assistance of counsel in his motion for postconviction relief. See *State v. Billups*, 263 Neb. 511, 641 N.W.2d 71 (2002). To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must

show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense. *State v. Long*, 264 Neb. 85, 645 N.W.2d 553 (2002). In order to show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *State v. George*, 264 Neb. 26, 645 N.W.2d 777 (2002).

Davlin argues generally that he was denied effective assistance of counsel by his trial counsel's failure to subject the prosecution's case to meaningful adversarial testing. In *United States v. Cronin*, 466 U.S. 648, 659, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), the U.S. Supreme Court explained that where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." The Court also noted:

The Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding. [Citations omitted.]

Apart from circumstances of that magnitude, however, there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt. [Citations omitted.]

United States v. Cronin, 466 U.S. at 659 n.25, 26.

We conclude that the record does not support a claim that Davlin's counsel entirely failed to subject the prosecution's case to meaningful adversarial testing, and therefore, prejudice will not be presumed.

We next proceed to analyze Davlin's ineffective assistance of counsel claims under the two prongs of *Strickland*. A defendant requesting postconviction relief must establish the basis for such relief, and the factual findings of the district court will not be disturbed unless they are clearly erroneous. See *State v. Becerra*, 263 Neb. 753, 642 N.W.2d 143 (2002). Appellate review of a claim of ineffectiveness assistance of counsel is a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the

lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independent of the lower court's decision. See, *id.*; *State v. White*, 246 Neb. 346, 518 N.W.2d 923 (1994).

(a) Failure to Investigate

Davlin claims that his requests for further investigation were not acted upon by trial counsel and that counsel's failure to respond to these requests amounted to ineffective assistance. Davlin alleges that he asked both trial counsel and appellate counsel to retain an expert to screen his car in an effort to detect the presence of bodily fluids that would be evidence of a sexual encounter in the car. Davlin also alleges he requested that counsel investigate the odometer reading of his car to establish that it could not have been driven to Omaha based on the odometer reading of the car when it was purchased compared to when it was seized.

The district court found that Davlin's requests to have his car's odometer checked and to have his car screened for bodily fluids were met with refusals, silence, or inaction. The court also found that "Davlin's requests were reasonable and, absent some evidence showing a reasonable basis for refusing them, should have been followed. [Counsel's] failure to do so falls below the minimum standards expected, and his responses lack the civility even a most difficult client should expect from his counsel." The court pointed out, however, that it was Davlin's burden to show what the requested actions would have disclosed, and the court concluded Davlin failed to do so.

In his deposition testimony, Davlin claimed that an inspection of the odometer in his vehicle would have disclosed that relative to the incident in question, he could not have driven to the crime scene and back to his home based on the number of miles on the car when it was purchased and the number of miles on the car when it was seized. However, Davlin did not produce evidence of the mileage at the time the vehicle was purchased, at the time of its impoundment by police, or at any time relevant to the

occurrence. In the absence of any facts to support his claim regarding the significance of the mileage on the odometer, Davlin has not shown how or why counsel's refusal to check the odometer was prejudicial to his defense.

Davlin asserts that if the requests had been acted upon, the result of the trial would have been different. The district court found that Davlin's assertion was unfounded and that he failed to meet his burden of showing that but for counsel's deficient performance, the result of the proceeding would have been different. We conclude that the district court did not err in this determination.

(b) Failure to Object

Davlin alleges that his appointed counsel repeatedly failed to make appropriate objections to damaging information elicited from M.D. Specifically, Davlin asserts that counsel should have objected to testimony relating to his procuring alcohol for a minor.

The district court explained that this testimony came from M.D. and could be considered necessary to explain her contact with Davlin in the period preceding the sexual assault. The court found that the testimony was relevant to M.D.'s identification of Davlin and that any unfair prejudice to him was remote. The court concluded that Davlin failed to meet either prong of his burden under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). We agree with the district court's conclusion.

(c) Failure to Question Expert on Cross-Examination

Davlin alleges trial counsel failed to properly question the State's expert forensic serologist on cross-examination. He asserts that counsel failed to question whether the findings of the microscopic examination of hair samples can be used to identify or exclude a suspect and that counsel failed to question the expert about alternative testing methods.

[6] In his operative motion for postconviction relief, Davlin argued that trial counsel failed to object to the expert forensic serologist's testimony; however, he did not argue that counsel failed to question the expert on cross-examination. When an issue is raised for the first time in an appellate court, it will be

disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition. *State v. Faber*, 264 Neb. 198, 647 N.W.2d 67 (2002). This issue was not presented to the district court, and therefore, we do not consider it.

(d) Failure to Obtain Independent Testing

Davlin alleges he requested that trial counsel obtain independent DNA testing of certain evidence. He claims counsel responded profanely and unprofessionally that independent testing was too costly. Davlin alleges that independent DNA testing was available at an affordable cost and that it was reasonable under the circumstances to pursue such testing. Davlin asserts that his counsel's failure to obtain independent DNA testing was unjustified and deficient.

The district court analyzed this issue together with Davlin's allegation of a failure to investigate. The court found that counsel's failure to appropriately respond to Davlin's request fell below the minimum standards expected. However, the court concluded that Davlin failed to meet his burden of showing what the independent testing would have disclosed. The court noted that the evidence samples had subsequently been destroyed but that there was no contention that such destruction was erroneous or wrongful in any manner. Thus, any issue relating to destruction of the evidence was not presented to the district court.

In his operative motion for postconviction relief, Davlin claimed that had independent DNA testing been conducted, he would have been able to show the jury that he was excluded as the donor of the semen collected from M.D. This conclusion cannot be supported by any facts because the DNA was destroyed. Davlin offered the deposition testimony of a deputy laboratory director employed by Cellmark Diagnostics in Maryland regarding the general nature of DNA testing being performed in late 1993 and early 1994. There was no evidence of what DNA testing would have revealed in this case. On appeal, Davlin now asserts that he was prejudiced because destruction of the evidence violated his due process rights. The destruction of the evidence was not an issue presented to the district court in Davlin's motion, and therefore, we do not consider it. The court

did not err in deciding the issue presented to it and in concluding that Davlin had failed to meet his burden of showing what independent testing would have disclosed.

(e) Jury Instruction No. 3

Davlin alleges his trial counsel's failure to object to jury instruction No. 3 and his appellate counsel's failure to raise the issue on appeal constitute ineffective assistance of counsel. Instruction No. 3 advised the jury of the material elements of first degree sexual assault. Instruction No. 3 stated that the State was required to prove that "[t]he defendant was 19 years of age or older and [M.D.] was *16 years of age or younger*." (Emphasis supplied.)

Davlin was charged under Neb. Rev. Stat. § 28-319(1)(c) (Cum. Supp. 1994), which prohibited sexual penetration when "the actor [was] nineteen years of age or older and the victim [was] *less than sixteen years of age*." (Emphasis supplied.) Davlin argues that the ages of the defendant and the victim are material elements in a first degree sexual assault case and that his counsel should have objected to the trial court's erroneous instruction. Davlin claims that because the error related to a material element of the crime, he does not have to prove prejudice. We disagree.

Davlin must show that there was a reasonable probability that but for counsel's alleged deficient performance, the result of the proceeding would have been different. See, *State v. Long*, 264 Neb. 85, 645 N.W.2d 553 (2002); *State v. George*, 264 Neb. 26, 645 N.W.2d 777 (2002).

Davlin argues that the instruction may well have confused the jury in light of M.D.'s testimony that she was 16 years old. Davlin claims that M.D. was never asked at trial how old she was at the time of the alleged sexual assault and that instruction No. 3 did little to clarify for the jury that the State had to prove she was less than 16 on the date of the alleged crime.

The district court did not err in concluding that Davlin failed to meet his burden of showing that his counsels' failure to object to instruction No. 3 and raise the issue on appeal prejudiced the outcome of this case. During trial, M.D. not only gave her birth date, which would establish that she was 15 years old at the time

of the assault, but she also testified that she told Davlin she was 15 years old.

We conclude that Davlin has failed to sustain his burden that he was denied effective assistance of counsel at trial or on direct appeal as required by *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

2. REQUEST FOR SUBSTITUTE COUNSEL

We next proceed to address Davlin's request for substitute counsel. Davlin assigned as error on appeal to the Court of Appeals that the trial court's failure to make an inquiry into his dissatisfaction with counsel and subsequent failure to appoint substitute counsel (1) violated his 6th Amendment right to effective representation and (2) violated his right to due process of law under the 14th Amendment.

The Court of Appeals concluded that the failure of the trial court to inquire as to the basis for Davlin's dissatisfaction when he moved for substitution of counsel denied Davlin his right to due process and required that Davlin's convictions and sentences be set aside and a new trial ordered.

As noted above, Davlin wrote a letter to the trial court shortly before trial. Davlin's letter contained allegations that his appointed counsel had failed to take actions that he had requested, including a request for further testing of bodily fluids and a request for DNA testing, as well as complaints regarding counsel's attitude and his refusal to answer Davlin's correspondence. From the letter, the court concluded that Davlin was writing to express dissatisfaction with his counsel and to communicate a desire to have such representation terminated.

The trial court informed Davlin that whether he had been afforded meaningful representation was an issue that could not be decided in advance. Thus, the court did not conduct a formal inquiry into Davlin's dissatisfaction with appointed counsel.

Following the hearing on Davlin's motion for postconviction relief, the district court found that Davlin's pretrial requests to have his car's odometer checked, independent DNA testing conducted, and fluid screening done on evidence samples from his car were met with refusals, silence, or inaction. The court found that "Davlin's requests were reasonable and, absent some

evidence showing a reasonable basis for refusing them, should have been followed. [Counsel's] failure to do so falls below the minimum standards expected, and his responses lack the civility even a most difficult client should expect from his counsel."

It appears that the district court analyzed Davlin's complaints about counsel as part of the ineffective assistance of trial counsel and concluded that counsel's performance was deficient. It did not address whether the trial court erred in not having a hearing on Davlin's motion for substitution of counsel.

When the district court addressed Davlin's claim that the trial court erred in denying his pro se request to replace the public defender with another court-appointed counsel, it found that Davlin's reasons for wanting counsel replaced were all premised on actions by counsel with which Davlin disagreed or conversations between Davlin and counsel. The court concluded that Davlin had failed to establish grounds for relief under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984):

Whether this case calls for a "presumption of prejudice" under United States v. Cronin, *supra*, and State v. Trotter, *supra*, — more particularly whether there has been a failure to subject the prosecution's case to a meaningful adversarial testing, or where the surrounding circumstances justify a presumption without inquiring into counsel's actual performance at trial — is a close call, but one I make in favor of the State. This conclusion, however, has no precedential value and should not be construed in any fashion as an approval of trial counsel's conduct.

The Court of Appeals interpreted the district court's order as a finding that the first prong of *Strickland* had been met with respect to trial counsel's performance at the time Davlin moved to dismiss counsel. The Court of Appeals held that the trial court's failure to inquire as to the basis for Davlin's dissatisfaction with appointed counsel deprived him of his right to counsel and denied him due process.

The Court of Appeals relied upon *Smith v. Lockhart*, 923 F.2d 1314, 1320 (8th Cir. 1991), for the following propositions:

When a defendant raises a seemingly substantial complaint about counsel, the judge "has an obligation to inquire

thoroughly into the factual basis of defendant's dissatisfaction." [Citations omitted.] The trial court must make the kind of inquiry that might ease the defendant's dissatisfaction, distrust, or concern. [Citation omitted.] That inquiry should be on the record.

The Court of Appeals concluded that a showing of prejudice was not required in analyzing the failure of the trial court to adequately inquire into Davlin's dissatisfaction with counsel. It determined that neither *Lockhart* nor any of the other cases to which it had referred discussed the prejudice requirement, and it concluded that the cases did not discuss the prejudice requirement because the failure of a trial court to inquire is a denial of due process. The court stated:

We conclude this is because the failure to inquire into a defendant's dissatisfaction with counsel is a denial by a court of the effective assistance of counsel, that is, a denial by a court of due process.

. . . When a defendant is deprived of a pretrial opportunity to disclose any such shortcoming to the court, that defendant is being deprived of due process.

State v. Davlin, 10 Neb. App. 866, 885, 639 N.W.2d 168, 183 (2002).

It was this failure to inquire into Davlin's complaints concerning trial counsel that was the basis of the Court of Appeals' conclusion that Davlin was denied due process and therefore entitled to a new trial.

The court in *Lockhart* determined that Smith had been denied counsel at a critical stage of the proceeding and, therefore, that prejudice was presumed. *Lockhart* held that when a complete denial of counsel at a critical stage is shown, there is often no need to show prejudice and the resulting trial is presumed to be unfair. Because the appellate court found that Smith had been completely denied counsel at a critical stage of the proceeding, prejudice was presumed and the court ordered a new trial.

[7] We agree with the principle in *Lockhart* cited by the Court of Appeals. Once a defendant asking for substitute counsel has raised a seemingly substantial complaint about counsel, the court has a duty to thoroughly inquire into the complaint. However, we disagree with the Court of Appeals' analysis of the consequences

if the trial court fails to make such an inquiry. We conclude that the failure to make such an inquiry must be considered under the Sixth Amendment and not as a denial of due process.

Recently, in *Mickens v. Taylor*, 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002), the U.S. Supreme Court was presented with the issue of what a defendant must show in order to demonstrate a Sixth Amendment violation when the trial court failed to inquire into a potential conflict of interest between the defendant and counsel about which the court knew or reasonably should have known. The Court stated:

The Sixth Amendment provides that a criminal defendant shall have the right to “the Assistance of Counsel for his defence.” This right has been accorded, we have said, “not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial.” *United States v. Cronin*, 466 U.S. 648, 658 (1984). It follows from this that assistance which is ineffective in preserving fairness does not meet the constitutional mandate, see *Strickland v. Washington*, 466 U.S. 668, 685-686 (1984); and it also follows that defects in assistance that have no probable effect upon the trial’s outcome do not establish a constitutional violation. As a general matter, a defendant alleging a Sixth Amendment violation must demonstrate “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.*, at 694.

There is an exception to this general rule. We have spared the defendant the need of showing probable effect upon the outcome, and have simply presumed such effect, where assistance of counsel has been denied entirely or during a critical stage of the proceeding. When that has occurred, the likelihood that the verdict is unreliable is so high that a case-by-case inquiry is unnecessary. See *Cronic*, *supra*, at 658-659; see also *Geders v. United States*, 425 U.S. 80, 91 (1976); *Gideon v. Wainwright*, 372 U.S. 335, 344-345 (1963). But only in “circumstances of that magnitude” do we forgo individual inquiry into whether counsel’s inadequate performance undermined the reliability of the verdict. *Cronic*, *supra*, at 659, n. 26.

Mickens v. Taylor, 535 U.S. at 166.

In *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), the Court listed the exceptions to the general rule that a defendant must demonstrate a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. The exceptions apply only when the surrounding circumstances justify the presumption of ineffectiveness. See *McGurk v. Stenberg*, 163 F.3d 470 (8th Cir. 1998).

These exceptions were set forth in *State v. Trotter*, 259 Neb. 212, 609 N.W.2d 33 (2000), where we stated that prejudice will be presumed: (1) where the accused is completely denied counsel at a critical stage of the proceedings, (2) where counsel fails to subject the prosecution's case to meaningful adversarial testing, and (3) where the surrounding circumstances may justify the presumption of ineffectiveness without inquiry into counsel's actual performance at trial. Prejudice will also be presumed where there is an actual conflict of interest among multiple defendants jointly represented by the same counsel. See, *United States v. Cronic*, *supra*; *State v. Trotter*, *supra*.

[8,9] In *Trotter*, we stated: "[T]his court has recognized in prior cases that under certain circumstances, the nature of counsel's deficient conduct in the context of the prior proceedings can lead to a presumption of prejudice, negating the defendant's need to offer evidence of actual prejudice in a postconviction case." 259 Neb. at 220, 609 N.W.2d at 39. Due to the instruction in *Cronic* that "prejudice may be presumed 'only when surrounding circumstances justify a presumption of ineffectiveness[.]' . . . courts have been appropriately cautious in presuming prejudice." *McGurk v. Stenberg*, 163 F.3d at 473 (quoting *United States v. Cronic*, *supra*).

[10] The circumstances surrounding Davlin's complaints do not justify a presumption of prejudice. Prejudice is presumed where the accused is completely denied counsel at a critical stage of the proceedings. *United States v. Cronic*, *supra*. That circumstance is not present here. Davlin was represented by counsel at all stages of the proceedings. Therefore, the presumption of prejudice is not to be applied.

[11] Prejudice is also presumed where counsel entirely fails to subject the prosecution's case to meaningful adversarial testing.

Id. As we have stated above, the record does not establish that counsel entirely failed to subject the prosecution's case to meaningful adversarial testing. Therefore, prejudice cannot be presumed on that basis.

The third instance under which prejudice is presumed is where the surrounding circumstances may justify a presumption of ineffectiveness without inquiry into counsel's actual performance at trial. See *Powell v. Alabama*, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932). In *Powell*, the surrounding circumstances made it so unlikely that any lawyer could provide effective assistance that ineffectiveness was properly presumed without inquiry into the actual performance at trial. We conclude that such circumstance is not presented here, nor are we presented with a circumstance where counsel was representing multiple defendants and therefore had a conflict of interest.

We conclude that the circumstances surrounding Davlin's complaints do not justify a presumption of prejudice. Since prejudice is not presumed, Davlin must show that but for counsel's deficiencies, there is a reasonable probability that the result of the proceeding would have been different.

In *U.S. v. Zillges*, 978 F.2d 369 (7th Cir. 1992), the court analyzed similar facts. The defendant sent the trial court a letter elaborating a number of objections to his retained counsel and requesting new counsel be appointed. The defendant asserted that his counsel had not spent enough time preparing the case, had declined to interview his witnesses, and had refused to meet with an investigator the defendant had hired. The trial court failed to respond to the letter until the opening of trial, which was over a month after the court had received the letter.

Following a trial and conviction, the defendant claimed on appeal that the trial court's failure to conduct a proper inquiry into his request for new counsel was reversible error. Although *Zillges* addressed the issue on the basis of whether an abuse of discretion required automatic reversal, the analysis is helpful. The appellate court concluded:

The denial of a motion for substitution of counsel will be upheld, despite an abuse of discretion, if the district court's error was harmless. . . . Under *Strickland v. Washington* . . . an error is harmless if it does not result in

a violation of a defendant's Sixth Amendment right to effective assistance of counsel. Thus, if a defendant is still afforded effective representation, an erroneous denial of a substitution motion is not prejudicial. By analogy, a district court's failure to conduct a sufficient inquiry into a substitution motion does not constitute reversible error unless it resulted in a denial of this Sixth Amendment right. Accordingly, in order to establish prejudice, [the defendant] must demonstrate that the performance of his attorney was not "within the range of competence demanded of attorneys in criminal cases" . . . and that "but for" counsel's deficiencies, "the result of the proceeding would have been different."

(Citations omitted.) *U.S. v. Zillges*, 978 F.2d at 372-73.

Davlin's assignment of error with regard to the trial court's failure to inquire about his dissatisfaction with trial counsel is without merit.

VI. CONCLUSION

The district court properly considered Davlin's claims concerning ineffective assistance of counsel and correctly concluded that Davlin had not met the burden of proof required by *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Having found no error by the district court, we reverse the decision of the Court of Appeals and remand the cause thereto with directions to affirm the judgment of the district court that denied Davlin's motion for postconviction relief.

REVERSED AND REMANDED WITH DIRECTIONS.

JACQAU L. MARTIN, APPELLANT, v.
BERNARD J. MCGINN ET AL., APPELLEES.

657 N.W.2d 217

Filed March 7, 2003. No. S-01-1247.

1. **Affidavits: Appeal and Error.** A district court's denial of in forma pauperis status under Neb. Rev. Stat. § 25-2301.02 (Cum. Supp. 2002) is reviewed de novo on the record based on the transcript of the hearing or the written statement of the court.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Affirmed in part, and in part reversed and remanded.

Jacqaus L. Martin, pro se.

No appearance for appellees.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, McCORMACK, and MILLER-LERMAN, JJ.

PER CURIAM.

NATURE OF CASE

This is an appeal from an order of the district court for Lancaster County which denied the appellant, Jacqaus L. Martin, leave to proceed in forma pauperis and dismissed his action.

BACKGROUND

Martin, an inmate at the Tecumseh State Correctional Institution, filed a pro se “Petition for Declaratory, Injunctive, and Other Equitable Relief/Damages” against several defendants.

On October 22, 2001, Martin filed an application to proceed in forma pauperis and an accompanying affidavit in support of his application. In an order filed November 1, the district court determined that Martin’s action was frivolous. It denied his application to proceed in forma pauperis and dismissed the action.

Martin timely appealed from the November 1, 2001, order and also filed an application to proceed in forma pauperis on appeal. The district court denied Martin leave to proceed in forma pauperis on appeal, once again stating that his action was frivolous and was not brought in good faith. We moved the case to our docket on our own motion.

ASSIGNMENT OF ERROR

Martin assigns, rephrased, that the district court erred in finding that his action was frivolous and in dismissing his action.

STANDARD OF REVIEW

[1] A district court’s denial of in forma pauperis status under Neb. Rev. Stat. § 25-2301.02 (Cum. Supp. 2002) is reviewed de novo on the record based on the transcript of the hearing or the

written statement of the court. § 25-2301.02(2); *Cole v. Blum*, 262 Neb. 1058, 637 N.W.2d 606 (2002).

ANALYSIS

Section 25-2301.02 provides:

(1) An application to proceed in forma pauperis shall be granted unless there is an objection that the party filing the application: (a) Has sufficient funds to pay costs, fees, or security or (b) is asserting legal positions which are frivolous or malicious. . . . Such objection may be made by the court on its own motion or on the motion of any interested person. The motion objecting to the application shall specifically set forth the grounds of the objection. An evidentiary hearing shall be conducted on the objection unless the objection is by the court on its own motion on the grounds that the applicant is asserting legal positions which are frivolous or malicious. If no hearing is held, the court shall provide a written statement of its reasons, findings, and conclusions for denial of the applicant's application to proceed in forma pauperis which shall become a part of the record of the proceeding. If an objection is sustained, the party filing the application shall have thirty days after the ruling or issuance of the statement to proceed with an action or appeal upon payment of fees, costs, or security notwithstanding the subsequent expiration of any statute of limitations or deadline for appeal. . . .

(2) In the event that an application to proceed in forma pauperis is denied and an appeal is taken therefrom, the aggrieved party may make application for a transcript of the hearing on in forma pauperis eligibility. Upon such application, the court shall order the transcript to be prepared and the cost shall be paid by the county

Martin filed an application to proceed in forma pauperis on October 22, 2001. The district court, in accordance with § 25-2301.02(1), objected to and denied his application. The district court's order regarding Martin's application to proceed in forma pauperis stated: "The petitioner, Jacquas [sic] L. Martin, has filed a motion to proceed in forma pauperis. Upon review of the petition, it is the determination of the court that this action is

frivolous. Therefore, the motion to proceed in forma pauperis is denied and the case is dismissed.”

A district court’s denial of in forma pauperis status under § 25-2301.02 is reviewed de novo on the record based on the transcript of the hearing or the written statement of the court. § 25-2301.02(2); *Cole v. Blum*, *supra*. From our de novo review of the transcript, we conclude that Martin’s application to proceed in forma pauperis was properly denied. The transcript does not support his motion.

However, the district court erred in ordering dismissal. Section 25-2301.02(1) provides: “If an objection is sustained, the party filing the application shall have thirty days . . . to proceed with an action or appeal upon payment of fees, costs, or security” The trial court erred in entering a dismissal because under the existing statute, if an objection to in forma pauperis is sustained, the party filing the application has 30 days to proceed with an action or appeal upon payment of fees and costs. We reach no determination on the merits of the action or whether it too is frivolous. That issue is not before us.

CONCLUSION

That portion of the district court’s order which denied Martin’s application to proceed in forma pauperis is affirmed. That portion of the district court’s order which dismissed Martin’s action is reversed, and the cause is remanded.

AFFIRMED IN PART, AND IN PART
REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V.
DARYLE M. DUNCAN, APPELLANT.
657 N.W.2d 620

Filed March 7, 2003. No. S-01-1256.

1. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.

2. **Trial: Courts.** Trial courts should refrain from commenting on evidence or making remarks prejudicial to a litigant or calculated to influence the minds of the jury.
3. **Trial: Proof: Appeal and Error.** To establish reversible error, a defendant must demonstrate that a trial court's conduct, whether action or inaction during the proceeding against the defendant, prejudiced or otherwise adversely affected a substantial right of the defendant.
4. **Evidence: Waiver: Appeal and Error.** A party who fails to make a timely objection to evidence waives the right on appeal to assert prejudicial error concerning the evidence received without objection.
5. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.
6. **Effectiveness of Counsel: Records: Appeal and Error.** A claim of ineffective assistance of counsel need not necessarily be dismissed merely because it is made on direct appeal; the determining factor is whether the record is sufficient to adequately review the question.
7. **Hearsay: Words and Phrases.** Prior consistent out-of-court statements are defined as nonhearsay and are admissible to rebut a charge of recent fabrication, improper influence, or improper motive only when those statements were made before the charged recent fabrication, improper influence, or improper motive.
8. **Evidence: Impeachment.** Attempts at impeachment cannot be equated to charges of recent fabrication.
9. **Trial: Evidence: Appeal and Error.** An objection, based on a specific ground and properly overruled, does not preserve a question for appellate review on any other ground.
10. **Trial: Rules of Evidence.** A trial court is required to weigh the danger of unfair prejudice against the probative value of the evidence only when requested to do so at trial.
11. **Rules of Evidence: Hearsay: Proof.** Under Neb. Evid. R. 801(3), Neb. Rev. Stat. § 27-801(3) (Reissue 1995), hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.
12. **Rules of Evidence: Words and Phrases.** Pursuant to Neb. Evid. R. 801(1), Neb. Rev. Stat. § 27-801(1) (Reissue 1995), a statement is defined in part as an oral or written assertion.
13. **Criminal Law: Evidence: Appeal and Error.** An erroneous admission of evidence is considered prejudicial to a criminal defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt.
14. **Verdicts: Juries: Appeal and Error.** Harmless error review looks to the basis on which the jury actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.
15. **Effectiveness of Counsel: Appeal and Error.** When the issue of ineffective assistance of counsel has not been raised or ruled on at the trial court level and the matter

necessitates an evidentiary hearing, an appellate court will not address the matter on direct appeal.

16. **Trial: Expert Witnesses: Appeal and Error.** The admission of expert testimony is ordinarily within the discretion of the trial court, and its ruling will be upheld in the absence of an abuse of discretion.
17. **Rules of Evidence: Expert Witnesses.** Four preliminary questions must be answered in order to determine whether an expert's testimony is admissible: (1) whether the witness qualifies as an expert pursuant to Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1995); (2) whether the expert's testimony is relevant; (3) whether the expert's testimony will assist the trier of fact to understand the evidence or determine a controverted factual issue; and (4) whether the expert's testimony, even though relevant and admissible, should be excluded in light of Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995).
18. **Trial: Expert Witnesses.** Whether a witness is qualified as an expert is a preliminary question for the trial court.
19. **Trial: Expert Witnesses: Appeal and Error.** A trial court is allowed discretion in determining whether a witness is qualified to testify as an expert, and unless the court's finding is clearly erroneous, such a determination will not be disturbed on appeal.
20. **Trial: Expert Witnesses.** A person may qualify as an expert by virtue of either formal training or actual practical experience in the field.
21. **Evidence: Words and Phrases.** Evidence is relevant when it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
22. **Trial: Rules of Evidence.** The fact that evidence is prejudicial is not enough to require exclusion, because most, if not all, of the evidence a party offers is calculated to be prejudicial to the opposing party. It is only the evidence that has a tendency to suggest a decision on an improper basis that is unfairly prejudicial under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995).

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Affirmed.

Michael F. Maloney for appellant.

Don Stenberg, Attorney General, and Susan J. Gustafson for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, McCORMACK, and MILLER-LERMAN, JJ.

McCORMACK, J.

NATURE OF CASE

Daryle M. Duncan was convicted of first degree murder and use of a deadly weapon to commit a felony in connection with

the December 4, 1999, death of Lucille Bennett. Duncan received consecutive sentences of life in prison on the murder charge and 19 to 20 years' imprisonment for use of a deadly weapon to commit a felony. Duncan appeals.

BACKGROUND

Shortly before 10:30 a.m. on Sunday, December 5, 1999, the body of Bennett was found in her home in Omaha, Nebraska. Bennett died from a stab wound to the right side of the neck, which penetrated two major arteries in the neck. Duncan was later arrested and charged with first degree murder and use of a deadly weapon to commit a felony in connection with the crime.

One of the State's primary witnesses at trial was Jaahlay Liwaru, Duncan's ex-wife. At the time of Bennett's murder, Liwaru was living in a drug treatment center to treat her addiction to crack cocaine. Duncan and Liwaru had agreed that Duncan would cash Liwaru's government assistance check and bring the money to Liwaru on December 3, 1999. Duncan did not show up that day or the next day.

Liwaru testified that between 1 and 3 a.m. on December 5, 1999, she received a telephone call from Duncan. Duncan told Liwaru that he did not have her money from the assistance check, which Liwaru interpreted to mean that he had used the money to buy drugs. Duncan went on to tell Liwaru that the "lady across the street" had been murdered. Duncan and Liwaru had previously lived directly across the street from Bennett. Liwaru also testified that Duncan told her that the lady had "got-ten sliced from . . . neck to neck . . . and she got stabbed up." Duncan also told Liwaru that he was going to go to hell. After Liwaru replied that he would not be going to hell for spending her money, Duncan replied, "[W]hat if I told you I killed Ms. Bennett." Immediately after the telephone call, Liwaru shared what Duncan had told her with Jennice Chanel, a patient at the treatment center. Chanel's testimony at trial of what Duncan told Liwaru was consistent with what Liwaru personally testified to.

Liwaru testified that she received another telephone call from Duncan shortly after 10 a.m. that same day. During the second telephone call, Duncan told Liwaru that he had seen Bennett being removed from her home. Other testimony from police and

other authorities at Bennett's home established that Bennett's body was not removed from her home until approximately 7 p.m. on December 5, 1999. Immediately following this call, Liwaru told Margaret Nocita, an employee of the center, that her neighbor had been murdered and robbed. The State later called Nocita, who verified Liwaru's testimony.

The State also called Bill Gartside, a criminologist in the DNA serology section of the Nebraska State Patrol laboratory. Gartside examined a number of hairs from Bennett's home and found that several were consistent with a reference sample of hairs collected from Duncan's dogs. Another hair found at Bennett's house possessed some similar characteristics as well as dissimilar characteristics with a reference sample of hairs from Duncan. Gartside testified that the major dissimilarity in the hair found at the scene and Duncan's reference hair sample was the manner in which it was cut. Duncan objected to Gartside's qualification as an expert in hair analysis and made a motion in limine to preclude Gartside from offering any testimony regarding hair analysis. Both the objection and motion were overruled.

At the conclusion of the trial, the jury found Duncan guilty of first degree murder and use of a deadly weapon to commit a felony. He received consecutive sentences of life in prison on the murder charge and 19 to 20 years' imprisonment for use of a deadly weapon to commit a felony.

Additional facts relevant to the resolution of each of Duncan's assignments of error are recited in detail below.

ASSIGNMENTS OF ERROR

Duncan first assigns that the district court committed prejudicial error when it commented to the jury panel that it was "'[t]he attorney for the defendant's job . . . to resist the State's case and prove his client innocent if necessary.'" Brief for appellant at 18.

Duncan also claims that the jury was allowed to consider inadmissible evidence due to either the district court's erroneous evidentiary rulings or trial counsel's ineffective assistance. Specifically, the evidence Duncan takes exception to is (1) William Jadowski's testimony on the subject of hair transfer, (2) the testimony of Chanel and Nocita regarding statements made to them by Liwaru, (3) Steven Henthorn's testimony regarding

Crimestoppers tips received by the police, (4) Gartside's testimony in the field of hair analysis, (5) Jeffrey Harrington's testimony that Duncan's physical appearance had changed over the years and that it appeared Duncan's life had taken a different turn, and (6) Liwaru's testimony that a pot found in Bennett's home belonged to Duncan.

STANDARD OF REVIEW

[1] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility. *State v. Pruett*, 263 Neb. 99, 638 N.W.2d 809 (2002).

ANALYSIS

DISTRICT COURT'S COMMENT

On March 26, 2001, jury selection in Duncan's trial began with the court's calling and swearing in a number of prospective jurors. Shortly after the State began questioning the panel, a prospective juror expressed concern about his ability to participate in a trial and return a guilty verdict which might later lead to a death sentence. The State responded by asking several questions of the prospective juror in an attempt to determine if the prospective juror could still act in a fair and impartial manner. The court also entered the discussion, stating:

[L]et me put it another way. Everybody in the courtroom has a job to do. The prosecution is to prosecute the case. Her job is to prove the defendant guilty beyond a reasonable doubt. The attorney for the defendant's job is to resist the State's case and prove his client innocent if necessary. The court reporter's job is to write down everything that is said in the courtroom. It's my job to referee this affair, and if a verdict of guilty is returned, to set the penalty. That's all I can tell you. Everybody has a different job to do. Does that help?

In his first assignment of error, Duncan argues that the district court committed prejudicial error when it commented to the jury panel that "[t]he attorney for the defendant's job is to resist the State's case and prove his client innocent if necessary." Brief

for appellant at 18. As a result, Duncan claims he is entitled to a new trial. Duncan characterizes the court's comment as a jury instruction. However, when viewed in context, it is clear that the district court was not attempting to instruct the jury panel on the applicable law. Instead, the court was merely commenting to one potential juror about the roles played by various participants in the trial.

[2,3] We have said that trial courts should refrain from commenting on evidence or making remarks prejudicial to a litigant or calculated to influence the minds of the jury. *State v. Red Kettle*, 239 Neb. 317, 476 N.W.2d 220 (1991). To establish reversible error, a defendant must demonstrate that a trial court's conduct, whether action or inaction during the proceeding against the defendant, prejudiced or otherwise adversely affected a substantial right of the defendant. *State v. Privat*, 251 Neb. 233, 556 N.W.2d 29 (1996). While the inaccuracy of the district court's comment is obvious, the record fails to show that Duncan was prejudiced by the court's comment.

Throughout the daylong voir dire, both the State and defense made numerous mentions to the jury panel of the "presumption of innocence" to be applied in Duncan's favor or to the standard of "proof beyond a reasonable doubt." At one point, Duncan's trial counsel pointed out the district court's error and told the jury panel:

I'm not sure when it was mentioned, but it was mentioned this morning that Mr. Duncan may have to prove himself innocent or something like that. That may not be the exact words, but all of you must understand that the burden is upon the State of Nebraska to prove him guilty.

After the jury was selected and sworn in, the district court issued its preliminary instructions to the jury. Those preliminary instructions correctly instructed that "[t]he Defendant is presumed to be innocent. This presumption of innocence is evidence in favor of the Defendant and continues throughout the trial, until he shall have been proved guilty beyond a reasonable doubt." The court also issued a preliminary instruction to the jury regarding reasonable doubt that closely resembled the approved instruction in *State v. McHenry*, 247 Neb. 167, 525 N.W.2d 620 (1995). Finally, the district court issued final, written instructions to the

jury at the close of the weeklong trial identical to those preliminary instructions mentioned above.

Viewing the erroneous comments at issue here in combination with the comments of the parties during jury selection, the accurate preliminary instructions, and the accurate final instructions, we conclude that Duncan suffered no prejudice as a result of the comment.

WILLIAM JADLOWSKI

Jadlowski, a sergeant with the Omaha Police Department, was one of the investigating officers at Bennett's home and testified generally as to the evidence found at the scene. Among these pieces of evidence were several sheets from Bennett's bed, which were sent to the Nebraska State Patrol for examination for the presence of any hairs. On cross-examination, Duncan's trial counsel asked Jadlowski whether hairs could be transferred by a person's walking from room to room and across floors and carpet such as those found in Bennett's home. Jadlowski answered yes. On redirect, the State then asked the following questions of Jadlowski:

Q. If you're walking along the floor, Detective Jadlowski, where will that hair — hair needs friction to adhere to something, doesn't it?

A. Typically, yes.

Q. All right. And so [i]f I'm walking on something and there happens to be a hair on the floor, in order for that hair to get on my bed, my foot with my shoe or sock or whatever is on my foot, has to come up and actually come in contact with the pillow, wouldn't it, to transfer it?

A. I think that's reasonable.

Q. I mean, there's not hairs floating around that just fall into a particular area, true?

[Defense:] I object to the form of the question, speculation and leading.

THE COURT: You may answer.

[A.] I think that's reasonable, yes.

Q. . . . It's like blood. It's transferred by contact, fair?

A. Yes.

Duncan claims that the district court erred when it overruled his objection above because without foundation to show

Jadlowski to be an expert in the field, the question called for speculation. With respect to those questions above which were not objected to, Duncan also claims he received ineffective assistance of counsel. We note that Duncan's trial counsel was different than his current counsel on this direct appeal.

[4] A party who fails to make a timely objection to evidence waives the right on appeal to assert prejudicial error concerning the evidence received without objection. *State v. Harms*, 263 Neb. 814, 643 N.W.2d 359 (2002), *modified on other grounds* 264 Neb. 654, 650 N.W.2d 481. However, Duncan may assert his claim of ineffective assistance of counsel because of the failure of his counsel to object. See, generally, *State v. Hansen*, 252 Neb. 489, 562 N.W.2d 840 (1997).

[5,6] To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense. *State v. Dean*, 264 Neb. 42, 645 N.W.2d 528 (2002). A claim of ineffective assistance of counsel need not necessarily be dismissed merely because it is made on direct appeal; the determining factor is whether the record is sufficient to adequately review the question. *State v. Long*, 264 Neb. 85, 645 N.W.2d 553 (2002).

Duncan claims that each of the questions set forth above called for expert opinion under Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1995). Duncan claims the State did not lay the proper foundation to qualify Jadlowski as an expert on the "electro-magnetic properties of hair transfer." Brief for appellant at 25. The State admits that Jadlowski was not qualified as an expert, but argues that this step was unnecessary because his testimony did not consist of "scientific, technical, or other specialized knowledge" under rule 702. We agree. The fact that hairs may stick to a person and be moved to a new location is not of such a scientific, technical, or specialized nature as to require expert qualification. Rule 702 provided no basis on which to object to Jadlowski's testimony. Thus, the district court did not err in overruling Duncan's objection, and Duncan cannot prove his trial counsel's performance was deficient. This assignment of error is without merit.

JENNICE CHANEL AND MARGARET NOCITA

Duncan next claims that the district court erroneously overruled his hearsay objections when Chanel and Nocita testified as to what Liwaru said to them after the two telephone calls on December 5, 1999.

[7] The State argues that Liwaru's statements to Chanel and Nocita were not hearsay, and thus admissible, under Neb. Evid. R. 801(4), Neb. Rev. Stat. § 27-801(4) (Reissue 1995), which provides:

A statement is not hearsay if:

(a) The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (ii) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive[.]

Prior consistent out-of-court statements are defined as nonhearsay and are admissible to rebut a charge of recent fabrication, improper influence, or improper motive only when those statements were made before the charged recent fabrication, improper influence, or improper motive. *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998).

[8] There is no dispute that Liwaru testified at trial and was subject to cross-examination concerning her statements to Chanel and Nocita. Those statements were also consistent with Liwaru's trial testimony. The issue remaining is whether Liwaru was expressly or impliedly charged with recent fabrication or improper influence or motive, or whether Duncan's cross-examination merely attempted to impeach Liwaru. We have said that attempts at impeachment cannot be equated to charges of recent fabrication. *State v. Buechler*, 253 Neb. 727, 572 N.W.2d 65 (1998). "One may impeach for lack of credibility without going so far as to charge recent fabrication. . . . We will not find abuse of discretion where . . . the impeachment is susceptible of either interpretation." *Id.* at 733, 572 N.W.2d at 70, quoting *Thomas v. U.S.*, 41 F.3d 1109 (7th Cir. 1994).

During Liwaru's cross-examination, the defense journeyed beyond mere impeachment and impliedly charged Liwaru with fabrication. The defense explored Liwaru's statements made

to police on December 10, 1999. Liwaru admitted on cross-examination that she told the police that her telephone calls with Duncan may have occurred on December 6 or on the evening of December 5. The defense asked Liwaru how many versions of the telephone calls she shared with the police, to which Liwaru replied “probably a couple.” The defense also asked Liwaru if Duncan had ever told her that he was involved in the murder of Bennett. Liwaru answered that he had not. These questions exhibit the defense’s implied charge that Liwaru had fabricated her trial testimony regarding the content of the two December 5 telephone calls from Duncan. Therefore, the State was entitled to offer the testimony of Chanel and Nocita to rebut such charge.

STEVEN HENTHORN

Next, Duncan argues that he was prejudiced by the district court’s erroneous evidentiary rulings and trial counsel’s ineffective assistance with regard to Henthorn’s testimony of Crimestoppers telephone calls.

Henthorn was the lead investigator assigned to the case and testified generally as to the investigation of Bennett’s murder. The specific portions of Henthorn’s testimony on direct examination and redirect examination at issue here are set forth below.

Q. Let me ask you, on December 5th or December 6th — and I don’t want you to tell me anything about what was said — but on December 5th or 6th of 1999, were there Crime Stoppers reports coming in to the police department about this murder?

[Defense]: I’ll object on relevance. Calls for a hearsay response.

[State]: I’m not asking him what was in them. I just wanted to know if they were coming in.

[Defense]: Relevance.

THE COURT: You may answer.

[A.] No, we were not.

. . . .

Q. . . . On the 7th of December, did Crime Stoppers calls — did you have any Crime Stoppers calls?

[Defense]: Objection, relevance. Calls for hearsay response.

[State]: Not what was in them.

THE COURT: Crime Stoppers calls in connection with what?

[State]: Regarding the murder of Lucille Bennett.

THE COURT: You may answer.

[A.] Yes, we did.

Q. . . . About what time was that?

A. I believe it was about 9:30 in the morning.

Q. Okay. And at some point in time did you begin investigating Mr. Duncan?

A. Yes.

Q. When was that?

A. About 9:30 in the morning —

Q. Okay.

A. — on the 7th of December.

Q. Okay. Did — what did you do after — at some point in time you got some information that Mr. Duncan — you started looking at him?

A. Yes.

. . . .

Q. . . . And did you get — in this particular case, did you get Crime Stoppers reports before — how many Crime Stoppers reports did you get before the 10th of December?

[Defense]: Objection, relevance, foundation.

THE COURT: You may answer.

[A.] Two.

[9,10] Duncan argues that the district court erred in overruling his relevance and hearsay objections above. Duncan further argues that this testimony was unfairly prejudicial because it allowed the jury to infer that someone called Crimestoppers and identified Duncan as a suspect. However, an objection, based on a specific ground and properly overruled, does not preserve a question for appellate review on any other ground. *State v. Timmens*, 263 Neb. 622, 641 N.W.2d 383 (2002). A trial court is required to weigh the danger of unfair prejudice against the probative value of the evidence only when requested to do so at trial. *State v. Schrein*, 244 Neb. 136, 504 N.W.2d 827 (1993). Duncan did not object to any portion of Henthorn's testimony under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue

1995), and we will not analyze the issue under that rule. Instead, we consider whether the evidence had any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would have been without the evidence, Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1995), and also whether Henthorn's testimony was inadmissible hearsay.

[11,12] We determine that the district court properly overruled Duncan's hearsay objections. Under § 27-801(3), hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. *State v. Pruett*, 263 Neb. 99, 638 N.W.2d 809 (2002). A statement is defined in part as an oral or written assertion. § 27-801(1). The two questions objected to by Duncan on hearsay grounds asked whether and when the police received any Crimestoppers calls. These questions did not call for an oral or written assertion made by an out-of-court declarant, and the content of those calls were never explicitly divulged.

[13,14] However, we conclude that the district court erred in overruling Duncan's relevance objections. An erroneous admission of evidence is considered prejudicial to a criminal defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt. *State v. Sheets*, 260 Neb. 325, 618 N.W.2d 117 (2000). See, also, *State v. Rieger*, 260 Neb. 519, 618 N.W.2d 619 (2000). Harmless error review looks to the basis on which the jury actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error. *State v. Brouillette*, ante p. 214, 655 N.W.2d 876 (2003).

Despite the court's erroneous admission of this evidence, we conclude, on these facts, that Duncan's conviction was surely unattributable to this error. The testimony of Liwaru, corroborated by Chanel and Nocita, established that Duncan was privy to details of Bennett's murder before Bennett's body was discovered and reported to police. Duncan also told Liwaru during one of the December 5, 1999, telephone calls that he murdered Bennett. This

evidence supports Duncan's conviction and renders the court's erroneous admission of Henthorn's testimony harmless.

[15] For those questions above where no objection was made, Duncan argues that he received ineffective assistance of counsel. Specifically, Duncan claims that counsel should have objected based on his confrontation rights under U.S. Const. amend. VI and XIV and Neb. Const. art. I, § 11, and on rules 401, 403, 801, and Neb. Evid. R. 802, Neb. Rev. Stat. § 27-802 (Reissue 1995). Duncan also claims his trial counsel was ineffective for failing to move for a mistrial. When the issue of ineffective assistance of counsel has not been raised or ruled on at the trial court level and the matter necessitates an evidentiary hearing, an appellate court will not address the matter on direct appeal. *State v. McLemore*, 261 Neb. 452, 623 N.W.2d 315 (2001). We determine that Duncan's argument of ineffective assistance of counsel regarding this issue requires an evidentiary hearing. Thus, we decline the opportunity to consider it here.

BILL GARTSIDE

In this assignment of error, Duncan argues that the district court erred in finding, over Duncan's objection, that Gartside was an expert witness in the field of hair analysis and in receiving his testimony into evidence. Duncan claims that "[t]he only evidence that Gartside was an expert in the area of hair analysis was his own claim to expertise." Brief for appellant at 42. Duncan also claims that he received ineffective assistance of counsel to the extent that trial counsel failed to object to any portion of Gartside's testimony under rules 401, 402, 403, and 702.

[16,17] The admission of expert testimony is ordinarily within the discretion of the trial court, and its ruling will be upheld in the absence of an abuse of discretion. *State v. Buechler*, 253 Neb. 727, 572 N.W.2d 65 (1998). Four preliminary questions must be answered in order to determine whether an expert's testimony is admissible: (1) whether the witness qualifies as an expert pursuant to rule 702; (2) whether the expert's testimony is relevant; (3) whether the expert's testimony will assist the trier of fact to understand the evidence or determine a controverted factual issue; and (4) whether the expert's testimony, even though relevant and

admissible, should be excluded in light of rule 403. *State v. Thieszen*, 252 Neb. 208, 560 N.W.2d 800 (1997).

[18-20] Whether a witness is qualified as an expert is a preliminary question for the trial court. *State v. Campbell*, 260 Neb. 1021, 620 N.W.2d 750 (2001). A trial court is allowed discretion in determining whether a witness is qualified to testify as an expert, and unless the court's finding is clearly erroneous, such a determination will not be disturbed on appeal. *Id.* A person may qualify as an expert by virtue of either formal training or actual practical experience in the field. *Id.*

Gartside testified that he has worked as a criminologist in the DNA serology section of the Nebraska State Patrol laboratory since January 1997. In that capacity, Gartside examines evidence for blood, body fluids, and hairs; analyzes that evidence; and writes reports and testifies in court as necessary. He received a bachelor of science degree from the State University of New York and has taken graduate level classes at the University of Nebraska in molecular biology, genetics, and biochemistry. Gartside testified that he has received specialized training in his field from the FBI, Royal Canadian Mounted Police, and others and has authored a number of published articles and papers related to his work. Gartside also stated that he has testified as an expert witness in the area of blood, DNA, and hair analysis on multiple occasions. Gartside described the procedures used to examine hair, including macroscopic and microscopic techniques, and testified that those procedures are recognized in the scientific community as valid. Gartside also testified that at the time of trial, he was the only hair examiner at the State Patrol laboratory. He estimated that he had probably looked at "thousands" of hairs in his career. Given this testimony, the district court was not clearly erroneous in finding that Gartside was qualified to testify as an expert witness in the field of hair analysis.

We have previously recognized the utility of scientific hair analysis in criminal cases. *State v. Harrison*, 218 Neb. 532, 357 N.W.2d 201 (1984). Gartside's testimony that several of the hairs found in Bennett's home were consistent with a sample of hairs obtained from Duncan's dogs could assist the jury in determining if Duncan were guilty of Bennett's murder. The district

court did not abuse its discretion in receiving Gartside's testimony, and trial counsel's failure to object to any portion of Gartside's testimony did not deprive Duncan of effective assistance of counsel. This assignment of error is without merit.

JEFFREY HARRINGTON

In this assignment of error, Duncan argues that the district court erred in overruling his objections to portions of Harrington's testimony. Harrington lived in the same neighborhood as Bennett and Duncan and had known Duncan for approximately 10 years. Harrington testified that he saw Duncan in that neighborhood on December 4, 1999, and that Duncan seemed "distant" during their brief conversation. The State asked Harrington if Duncan's physical appearance had changed over the time that Harrington had known Duncan. Over Duncan's relevance objection, Harrington testified that Duncan had previously been "handsome," "articulate," and "neat in his appearance." However, Harrington testified that after Duncan had moved into his present neighborhood, Duncan's appearance was "distinctly different . . . so different I remember thinking that his . . . life had taken a different turn." The defense objected to this answer on grounds that it was non-responsive, called for speculation, and lacked foundation. The objection was overruled.

[21] Duncan argues that the district court erred in overruling these objections because the testimony was irrelevant. Evidence is relevant when it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *State v. Davlin*, 263 Neb. 283, 639 N.W.2d 631 (2002). Having reviewed the record, we cannot conceive of any fact or consequence for which evidence of Duncan's changing appearance over the course of almost 10 years may have made more or less probable. However, for the same reasons we articulated above in regard to the court's erroneous receipt of portions of Henthorn's testimony, Duncan's conviction was unattributable to the court's erroneous evidentiary ruling here. See *State v. Brouillette*, ante p. 214, 655 N.W.2d 876 (2003). Duncan's assignment of error is without merit.

POT IN SINK

Finally, Duncan claims that his trial counsel provided ineffective assistance when he failed to object to Liwaru's testimony that a pot found in Bennett's home belonged to her and Duncan. During her testimony, Liwaru was asked by the State to examine exhibit 53, a photograph depicting Bennett's kitchen. Liwaru was asked if she recognized anything in the photograph. Liwaru replied that she recognized the pot in the sink and further testified that the pot belonged to her and Duncan.

Duncan argues that his trial counsel was ineffective for failing to object to this testimony under rule 403 and Neb. Evid. R. 602 and 901, Neb. Rev. Stat. §§ 27-602 and 27-901 (Reissue 1995). Rule 403 provides that relevant evidence may be excluded if its probative value is substantially outweighed by the risk of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

[22] Liwaru testified that she and Duncan would occasionally use their pots to get water from the side of Bennett's house. Liwaru also testified that she had never entered Bennett's kitchen and did not give Bennett the pot. Thus, Liwaru's testimony had probative value because it placed Duncan at Bennett's home. For the same reason, the testimony was prejudicial to Duncan. However, the fact that evidence is prejudicial is not enough to require exclusion, because most, if not all, of the evidence a party offers is calculated to be prejudicial to the opposing party. It is only the evidence that has a tendency to suggest a decision on an improper basis that is unfairly prejudicial under rule 403. *State v. Long*, 264 Neb. 85, 645 N.W.2d 553 (2002). Any rule 403 objection Duncan's trial counsel might have made would have been overruled by the court. Therefore, Duncan cannot show that his trial counsel's performance in this respect was deficient.

CONCLUSION

For the reasons set out above, the judgment of the district court is affirmed.

AFFIRMED.

CATHY L. JACKSON, APPELLANT, v. MORRIS COMMUNICATIONS CORPORATION, DOING BUSINESS AS YORK NEWS-TIMES, APPELLEE.
657 N.W.2d 634

Filed March 7, 2003. No. S-01-1355.

1. **Pleadings: Appeal and Error.** Whether a petition states a cause of action is a question of law, regarding which an appellate court has an obligation to reach a conclusion independent of that of the inferior court.
2. **Termination of Employment.** Unless constitutionally, statutorily, or contractually prohibited, an employer, without incurring liability, may terminate an at-will employee at any time with or without reason.
3. **Employer and Employee: Public Policy: Damages.** Under the public policy exception to the at-will employment doctrine, an employee can claim damages for wrongful discharge when the motivation for the firing contravenes public policy.
4. **Workers' Compensation: Legislature: Intent.** The Legislature enacted the Nebraska Workers' Compensation Act to relieve injured workers from the adverse economic effects caused by a work-related injury or occupational disease.
5. **Workers' Compensation: Appeal and Error.** In light of the beneficent purpose of the Nebraska Workers' Compensation Act, the appellate courts give the act a liberal construction to carry out justly the spirit of the act.
6. **Workers' Compensation: Employer and Employee: Public Policy.** The Nebraska Workers' Compensation Act presents a clear mandate of public policy which warrants application of the public policy exception to the at-will employment doctrine.
7. **Actions: Workers' Compensation: Employer and Employee.** An action for retaliatory discharge is allowed when an employee has been discharged for filing a workers' compensation claim.

Appeal from the District Court for York County: ALAN G. GLESS, Judge. Reversed and remanded for further proceedings.

Stefanie J. Flodman, of Johnson, Flodman, Guenzel & Widger, for appellant.

Charles W. Campbell, of Angle, Murphy, Valentino & Campbell, P.C., for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

This case presents the question whether this court should recognize a cause of action for retaliatory discharge when an

employer discharges an employee for filing a workers' compensation claim. Cathy L. Jackson appeals the district court's dismissal of her petition based upon the failure to state a cause of action. The petition alleged that Morris Communications Corporation, doing business as York News-Times, terminated her employment because she filed a workers' compensation claim and that she suffered damages. The district court dismissed the petition because Nebraska law has not recognized a cause of action for wrongful discharge in retaliation for filing a workers' compensation claim.

We determine that a public policy exception to the at-will employment doctrine applies to allow a cause of action for retaliatory discharge when an employee is fired for filing a workers' compensation claim. Accordingly, we reverse, and remand for further proceedings.

BACKGROUND

Jackson filed a petition alleging the following: In November 1994, she was employed by the York News-Times to work in the mailroom division of its distribution department. Her initial wage was \$4.50 per hour, with a schedule of 30.5 hours per week. In January 1995, she was promoted to bundle driver and her hourly pay was raised. In July 1996, she was promoted to cocirculation manager, with a salary of \$15,000 per year and various benefits.

In March 1997, she injured her left wrist while operating a labeling machine. She reported the injury, and a report was filed in accordance with the workers' compensation laws. Jackson sought medical attention and was treated conservatively. By April, she was unable to perform some of her required duties because of the injury. As a result, her duties and pay were adjusted. In May, her supervisor began logging alleged problems with her performance and met with her three times between May 19 and 27 to criticize her performance.

On June 2, 1997, Jackson's physical therapist contacted her supervisor, recommending that Jackson not perform any repetitive duties with her left wrist. The York News-Times fired Jackson on June 16. At the end of July, Jackson's wrist was x-rayed and she learned that the wrist was fractured. Because of the delay in receiving treatment and because she had continued to perform her

duties at work for several months, she suffered bone loss and required a full fusion of the left wrist.

Jackson alleged that she was discharged because she was injured and had filed a workers' compensation claim. The petition stated that under the Nebraska Workers' Compensation Act, Neb. Rev. Stat. § 48-101 et seq. (Reissue 1993 & Cum. Supp. 1996), it is the public policy of Nebraska that workers receive the benefits of the act. Jackson contended that this policy justified the recognition of a cause of action for wrongful discharge when an employee is discharged in retaliation for filing a workers' compensation claim.

The York News-Times demurred, alleging that the petition failed to state a cause of action and that the action was barred by the statute of limitations. The court sustained the demurrer and dismissed the petition, stating that the cause of action was not yet recognized by Nebraska law and that a trial court should not create a new cause of action. Jackson appeals.

ASSIGNMENT OF ERROR

Jackson assigns, rephrased, that the district court erred in failing to recognize a cause of action and dismissing her petition.

STANDARD OF REVIEW

[1] Whether a petition states a cause of action is a question of law, regarding which an appellate court has an obligation to reach a conclusion independent of that of the inferior court. *Malone v. American Bus. Info.*, 262 Neb. 733, 634 N.W.2d 788 (2001).

ANALYSIS

Jackson urges this court to adopt a cause of action for retaliatory discharge when an employer discharges an employee for filing a workers' compensation claim. She argues that her discharge contravenes public policy and should be recognized as an exception to the at-will employment doctrine. York News-Times, however, contends that there is no clear pronouncement of public policy to allow the recognition of the cause of action.

PUBLIC POLICY EXCEPTIONS TO AT-WILL EMPLOYMENT DOCTRINE

[2,3] The clear rule in Nebraska is that unless constitutionally, statutorily, or contractually prohibited, an employer, without

incurring liability, may terminate an at-will employee at any time with or without reason. *Malone v. American Bus. Info.*, *supra*. We recognize, however, a public policy exception to the at-will employment doctrine. *Id.* See, *Mau v. Omaha Nat. Bank*, 207 Neb. 308, 299 N.W.2d 147 (1980), *disapproved on other grounds*, *Johnston v. Panhandle Co-op Assn.*, 225 Neb. 732, 408 N.W.2d 261 (1987). Under the public policy exception, we will allow an employee to claim damages for wrongful discharge when the motivation for the firing contravenes public policy. *Malone v. American Bus. Info.*, *supra*.

This court has applied the public policy exception in several cases. In one case, an employee alleged that he was terminated because he refused to take a polygraph test. *Ambroz v. Cornhusker Square Ltd.*, 226 Neb. 899, 416 N.W.2d 510 (1987). We noted that under the Licensing of Truth and Deception Examiners Act, Neb. Rev. Stat. § 81-1901 et seq. (Reissue 1999), an employer could not condition employment on a requirement that a person submit to a truth and deception examination. See, § 81-1932; *Ambroz v. Cornhusker Square Ltd.*, *supra*. A violation of § 81-1932 is a Class II misdemeanor. See § 81-1933. As a result, we determined that the statutory provision constituted a pronouncement of public policy that clearly prohibited the use of a polygraph to deny employment. We then defined the circumstances in which the public policy exception would be recognized, stating:

This is a case involving a discharge in violation of a clear, statutorily mandated public policy. We believe that it is important that abusive discharge claims of employees at will be limited to manageable and clear standards. The right of an employer to terminate employees at will should be restricted only by exceptions created by statute or to those instances where a very clear mandate of public policy has been violated. This case falls within that rule.

Ambroz v. Cornhusker Square Ltd., 226 Neb. at 905, 416 N.W.2d at 515.

We have also recognized a public policy exception when an employee claimed he was discharged for reporting his suspicions that his employer was violating state odometer fraud laws. *Schriner v. Meginnis Ford Co.*, 228 Neb. 85, 421 N.W.2d 755

(1988). Unlike *Ambroz*, there was no statute in *Schriner* that prohibited an employer from discharging an employee for reporting criminal conduct. We noted, however, that it was a crime to engage in odometer fraud in Nebraska. See Neb. Rev. Stat. § 60-132 et seq. (Reissue 1998). We then reasoned that the enforcement of the criminal code is a basic public policy and that the enactment of the criminal statute was a declaration of public policy against odometer fraud. But we then found that an action for wrongful discharge could lie only if the employee acted in good faith when reporting the violation of the criminal code. Because there was no evidence that the employee had reasonable cause to believe that his employer acted unlawfully, we affirmed the trial court's order granting the employer summary judgment. The Nebraska Court of Appeals has also found a public policy exception when an employee was discharged for refusing to drive a truck that had defective brakes, because to do so would be a violation of the criminal code. *Simonsen v. Hendricks Sodding & Landscaping*, 5 Neb. App. 263, 558 N.W.2d 825 (1997).

More recently, we refused to find a public policy exception when an employee was discharged for asserting a claim under the Nebraska Wage Payment and Collection Act, Neb. Rev. Stat. § 48-1228 et seq. (Reissue 1998). *Malone v. American Bus. Info.*, 262 Neb. 733, 634 N.W.2d 788 (2001). We noted that unlike the act in *Ambroz*, the Nebraska Wage Payment and Collection Act did not contain a specific provision restricting an employer's right to discharge an at-will employee. We further noted that cases from other jurisdictions were of little guidance because of differences in statutory language. States that allowed a claim for retaliatory discharge had statutes that prohibited employers from discharging employees for making a claim or made such a discharge a crime. We stated that the act was primarily remedial in nature and provided specific procedures for the enforcement of substantive rights to compensation for work performed that arise not from the statute but from the employment relationship itself. We ultimately concluded that the Nebraska Wage Payment and Collection Act "does not represent a 'very clear mandate of public policy' which would warrant recognition of an exception to the employment-at-will doctrine." *Malone v. American Bus. Info.*, 262 Neb. at 739, 634 N.W.2d at 793.

NEBRASKA WORKERS' COMPENSATION ACT

Section 48-145(1) requires employers to carry insurance or provide money to the State Treasurer as a self-insurer. Section 48-145(3) then provides that an employer who fails to comply with the section will be required to respond in damages to an employee for personal injuries.

The Nebraska Workers' Compensation Act does not specifically prohibit an employer from discharging an employee for filing a claim, nor does it specifically make it a crime for an employer to do so. The statutes do, however, contain two other criminal provisions. Section 48-144.04 makes the failure to file a report required by the act a Class II misdemeanor. In addition, under § 48-145.01, it is a Class I misdemeanor for any employer to willfully fail to secure payment of compensation under the act as required by § 48-145.

Courts in other jurisdictions have recognized a statutory exception to the at-will employment doctrine when an employee is discharged in retaliation for filing a claim. But many of these jurisdictions have done so because of a statute that specifically prohibits discharge for the filing of a claim or makes such a discharge a crime. See, *Michaels v. Anglo American Auto Auctions*, 117 N.M. 91, 869 P.2d 279 (1994); *Lally v. Copygraphics*, 85 N.J. 668, 428 A.2d 1317 (1981); *Sventko v. Kroger*, 69 Mich. App. 644, 245 N.W.2d 151 (1976). See *Brown v. Transcon Lines*, 284 Or. 597, 588 P.2d 1087 (1978) (statute prohibits discrimination against employee for filing claim). In addition, some courts have recognized an exception based on other statutes that are more detailed than Nebraska's act. See, *Krein v. Marian Manor Nursing Home*, 415 N.W.2d 793 (N.D. 1987) (interpreting public policy statement in act); *Clanton v. Cain-Sloan Co.*, 677 S.W.2d 441, 443 (Tenn. 1984) (interpreting statutory language "all but identical" to that in *Frampton v. Central Ind. Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973)); *Frampton v. Central Ind. Gas Co.*, 260 Ind. at 252, 297 N.E.2d at 427-28 (statute provided that no contract, rule, regulation, "'or other device'" could operate to relieve employer from workers' compensation obligation).

Some courts, however, recognize an exception, even in the absence of a specific statutory prohibition. For example, the

Supreme Court of Nevada adopted an exception in the absence of a clear statutory prohibition. *Hansen v. Harrah's*, 100 Nev. 60, 675 P.2d 394 (1984). The court noted that workers' compensation laws reflect a clear public policy favoring economic security for injured employees. The court stated:

"Unquestionably, compensation laws were enacted as a humanitarian measure. The modern trend is to construe the industrial insurance acts broadly and liberally, to protect the interest of the injured worker and his dependents. A reasonably, liberal and practical construction is preferable to a narrow one, since these acts are enacted for the purpose of giving compensation, not for the denial thereof."

Id. at 63, 675 P.2d at 396. The Nevada court observed that if employers are permitted to penalize employees for filing workers' compensation claims, an important public policy would be undermined:

Failure to recognize the cause of action of retaliatory discharge for filing a workmen's compensation claim would only undermine Nevada's Act and the strong public policy behind its enactment. . . .

"The Act creates a duty in the employer to compensate employees for work-related injuries (through insurance) and a right in the employee to receive such compensation. But in order for the goals of the Act to be realized and for public policy to be effectuated, the employee must be able to exercise his right in an unfettered fashion without being subject to reprisal. If employers are permitted to penalize employees for filing workmen's compensation claims, a most important public policy will be undermined. The fear of being discharged would have a deleterious effect on the exercise of a statutory right. Employees will not file claims for justly deserved compensation—opting, instead, to continue their employment without incident. The end result, of course, is that the employer is effectively relieved of his obligation."

Hansen v. Harrah's, 100 Nev. at 63-64, 675 P.2d at 396, quoting *Frampton v. Central Ind. Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973). See, also, *Murphy v. City of Topeka*, 6 Kan. App. 2d 488, 630 P.2d 186 (1981) (adopting exception even though legislature

had twice considered, and not adopted, amendments that would specifically prohibit discharge); *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353, 23 Ill. Dec. 559 (1978) (adopting exception in absence of explicit statutory provision at time of discharge, but noting that explicit provision had been added by time of appeal).

A minority of courts has refused to recognize an exception, often with little analysis or explanation. See, e.g., *Federici v. Mansfield Credit Union*, 399 Mass. 592, 506 N.E.2d 115 (1987) (no specific statutory prohibition); *Smith v. Piezo Technology & Prof. Adm'rs*, 427 So. 2d 182 (Fla. 1983) (providing little analysis, and recognizing statutory claim); *Raley v. Darling Shop of Greenville, Inc.*, 216 S.C. 536, 59 S.E.2d 148 (1950) (providing no analysis). But, the refusal to recognize the exception generally is done in deference to the legislature. See *Kelly v. Mississippi Valley Gas Co.*, 397 So. 2d 874 (Miss. 1981).

It is true that Nebraska has not specifically prohibited an employer from discharging an employee for filing a workers' compensation claim. Nor has Nebraska specifically made this a crime. Although the Nebraska Workers' Compensation Act contains some criminal provisions, these relate to the willful failure of an employer to carry insurance or make self-insurance payments under the act. They do not specifically apply to the discharge of an employee who has filed a claim. Thus, we are not presented with the same type of clear mandate of public policy as was present in *Ambroz v. Cornhusker Square Ltd.*, 226 Neb. 899, 416 N.W.2d 510 (1987), and *Schriner v. McGinnis Ford Co.*, 228 Neb. 85, 421 N.W.2d 755 (1988). But we also recognize that the Nebraska Workers' Compensation Act has a much wider scope and purpose than does the Nebraska Wage Payment and Collection Act that we addressed in *Malone v. American Bus. Info.*, 262 Neb. 733, 634 N.W.2d 788 (2001). There, we noted that the Nebraska Wage Payment and Collection Act is largely remedial in nature and provides specific procedures for the enforcement of substantive rights to compensation for work performed that arise not from the statute but from the employment relationship itself. The Nebraska Workers' Compensation Act, however, creates a range of substantive rights that arise from the statute itself.

Unlike the Nebraska Wage Payment and Collection Act, the general purpose and unique nature of the Nebraska Workers' Compensation Act itself provides a mandate for public policy. In the early 1900's, state legislatures began enacting workers' compensation laws to provide employees with more effective remedies for work-related injuries than was available under tort law. See, Jean C. Love, *Retaliatory Discharge for Filing a Workers' Compensation Claim: The Development of a Modern Tort Action*, 37 Hastings L.J. 551 (1986). Tort law provided complete compensation, but required proof of negligence, and actions were often barred by affirmative defenses such as assumption of the risk and contributory negligence. *Id.* The result was a system that is often referred to as a "compromise" between employees and employers. *Id.* Employees gave up complete compensation in exchange for no-fault benefits that are received quickly and provide certain reimbursement for most economic losses. *Id.*

[4,5] We have recognized that the Legislature enacted the Nebraska Workers' Compensation Act to relieve injured workers from the adverse economic effects caused by a work-related injury or occupational disease. *Foote v. O'Neill Packing*, 262 Neb. 467, 632 N.W.2d 313 (2001). In light of this beneficent purpose of the act, we have consistently given the act a liberal construction to "“carry out justly the spirit of the Nebraska Workers' Compensation Act.””” *Foote v. O'Neill Packing*, 262 Neb. at 473, 632 N.W.2d at 320, quoting *Phillips v. Monroe Auto Equip. Co.*, 251 Neb. 585, 558 N.W.2d 799 (1997).

Thus, unlike the Nebraska Wage Payment and Collection Act that we examined in *Malone*, the Nebraska Workers' Compensation Act is unique because of its overriding purpose and the substantive rights it creates for employees. As the court stated in *Hansen v. Harrah's*, 100 Nev. 60, 675 P.2d 394 (1984), the act creates a duty to provide compensation through insurance or self-insurance that would be seriously frustrated if employers were able to prevent employees from filing claims through the threat of discharge. We are cognizant of an employer's interest in having freedom to discharge at-will employees, but as one court has noted, the effect of the substitution of workers' compensation for the common law was to eliminate a cause of action by an employee against his or her employer for work-related injuries.

Leach v. Lauhoff Grain Co., 51 Ill. App. 3d 1022, 366 N.E.2d 1145, 9 Ill. Dec. 634 (1977). To hold that there is not a clear public policy warranting an exception to the at-will employment doctrine would ignore the beneficent nature of the Nebraska Workers' Compensation Act. This, in effect, would allow an employer to say to the employee: "'Although you have no right to a tort action, you have a right to a workmen's compensation claim which, while it may mean less money, is a sure thing. However, if you exercise that right, we will fire you.'" *Id.* at 1024, 366 N.E.2d at 1147, 9 Ill. Dec. at 636.

[6,7] The Nebraska Workers' Compensation Act was promulgated to serve an important public purpose, and a rule which allows fear of retaliation for the filing of a claim undermines that policy. We are convinced that the unique and beneficent nature of the Nebraska Workers' Compensation Act presents a clear mandate of public policy which warrants application of the public policy exception. Thus, we recognize a public policy exception to the at-will employment doctrine and allow an action for retaliatory discharge when an employee has been discharged for filing a workers' compensation claim.

Here, Jackson filed a petition alleging that she was discharged in retaliation for filing a claim. The district court dismissed the petition because it did not recognize a cause of action for retaliatory discharge and did not address whether the petition would state a cause of action if it were recognized. Accordingly, we reverse, and remand for further proceedings. We note that to the extent that Jackson's petition states conclusions and lacks factual allegations, she should be given leave to amend. We also note that the district court did not address the York News-Times' allegation that the action is barred by the statute of limitations, and the York News-Times did not cross-appeal the issue. Thus, we do not address it on appeal. See, *Weimer v. Amen*, 235 Neb. 287, 455 N.W.2d 145 (1990); *Hays v. County of Douglas*, 192 Neb. 580, 223 N.W.2d 143 (1974).

REVERSED AND REMANDED FOR
FURTHER PROCEEDINGS.

RICHARD HARTMAN AND PATRICIA HARTMAN, HUSBAND
AND WIFE, APPELLEES, v. CITY OF GRAND ISLAND,
A POLITICAL SUBDIVISION, APPELLANT.
657 N.W.2d 641

Filed March 7, 2003. No. S-02-098.

1. **Arbitration and Award: Appeal and Error.** In reviewing a district court's decision to vacate, modify, or confirm an arbitration award under Nebraska's Uniform Arbitration Act, an appellate court is obligated to reach a conclusion independent of the trial court's ruling as to questions of law. However, the trial court's factual findings will not be set aside on appeal unless clearly erroneous.
2. **Statutes: Judgments: Appeal and Error.** Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
3. **Arbitration and Award: Appeal and Error.** Appellate review of an arbitrator's award is necessarily limited because to allow full scrutiny of such awards would frustrate the purpose of having arbitration at all—the quick resolution of disputes and the avoidance of the expense and delay associated with litigation. Strong deference is due an arbitral tribunal; when parties agree to arbitration, they agree to accept whatever reasonable uncertainties might arise from the process.

Appeal from the District Court for Hall County: JAMES LIVINGSTON, Judge. Affirmed.

Charles J. Cuypers, Grand Island City Attorney, and John R. Brownell, of Lauritsen, Brownell, Brostrom, Stehlik, Thayer & Myers, for appellant.

Vincent Valentino, of Angle, Murphy, Valentino & Campbell, P.C., for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, McCORMACK, and MILLER-LEMAN, JJ.

STEPHAN, J.

This is an appeal from an order of the district court for Hall County confirming an arbitration award entered on July 20, 2001, in favor of Richard Hartman and Patricia Hartman and against the City of Grand Island, Nebraska, and entering judgment thereon. We affirm.

FACTS

The Hartmans claim that the city's operation of a coal-fired power plant near their property caused damage to their home

and outbuildings. In the summer of 2000, the parties decided to resolve their dispute through arbitration. The parties agreed upon an arbitration panel consisting of three members, with one appointed by the city, one appointed by the Hartmans, and one appointed jointly by the parties. They further agreed that the arbitration would be binding on all parties.

In a letter to the parties dated July 20, 2001, the arbitrators resolved the claim in favor of the Hartmans and awarded them \$100,000. John Higgins, one of the arbitrators, prepared the award letter at the request of and in the presence of the other two panel members. The award was signed "THE BOARD OF ARBITRATORS By John R. Higgins, Jr.," but was not signed by the other two arbitrators.

In September 2001, the Grand Island City Attorney contacted Higgins and requested a letter of clarification based on his concern that the award letter did not include sufficient detail. Higgins independently drafted a letter explaining the methodology used to reach the award and setting forth the documents reviewed by the arbitrators. This letter was also signed only by Higgins.

The city council declined to treat the arbitration award as binding, and consequently, the Hartmans filed a petition for confirmation of arbitration award on October 22, 2001. In its answer, filed December 4, 2001, the city affirmatively alleged that the arbitration was not binding. The city also alleged that the award was "inequitable, grossly excessive, and will shock the conscience of the Court" and that it "is void for the reason that the award or decision was not signed by all arbitrators as required by law." On December 6, 2001, the Hartmans filed a reply alleging that the city had waived any right to challenge the decision or award of the arbitrators by failing to timely comply with Neb. Rev. Stat. § 25-2613(b) (Cum. Supp. 2002).

After an evidentiary hearing, the district court confirmed the award by entering judgment in conformity therewith in favor of the Hartmans and against the city in the amount of \$100,000. The city then perfected this timely appeal.

ASSIGNMENTS OF ERROR

The city assigns that the district court erred (1) in determining that the arbitration award was valid despite the fact that all

of the arbitrators did not sign the agreement and (2) by not finding that the arbitration award was inequitable.

STANDARD OF REVIEW

[1] In reviewing a district court's decision to vacate, modify, or confirm an arbitration award under Nebraska's Uniform Arbitration Act, an appellate court is obligated to reach a conclusion independent of the trial court's ruling as to questions of law. However, the trial court's factual findings will not be set aside on appeal unless clearly erroneous. *Jones v. Summit Ltd. Partnership Five*, 262 Neb. 793, 635 N.W.2d 267 (2001).

[2] Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Egan v. Stoler*, ante p. 1, 653 N.W.2d 855 (2002); *Governor's Policy Research Office v. KN Energy*, 264 Neb. 924, 652 N.W.2d 865 (2002).

ANALYSIS

The district court determined that this case is governed by the Uniform Arbitration Act, Neb. Rev. Stat. §§ 25-2601 to 25-2622 (Reissue 1995 & Cum. Supp. 2000). Neither party has taken exception to this determination, and we agree that the arbitration at issue here is governed exclusively by state law.

The city's first assignment of error concerns the refusal of the district court to invalidate the award based upon the fact that it was signed by only one of the three arbitrators. Section 25-2609(a) provides in pertinent part that "[t]he award shall be in writing and signed by the arbitrators joining in the award." The record reflects that Higgins prepared the July 20, 2001, letter setting forth the award at the request of the other two arbitrators and in their presence. Higgins testified at the confirmation hearing that this letter constituted the award that the arbitrators intended to issue. With the specific consent and approval of the other two arbitrators, Higgins signed the award letter on behalf of the panel. It is thus clear from the record that the failure of two of the three arbitrators to sign the award in strict compliance with § 25-2609(a) constitutes a defect as to the form of the award, but not as to its substance.

The Uniform Arbitration Act provides a party with two alternative remedies applicable in this circumstance. First, § 25-2614(a) provides: "Upon application made within ninety days after delivery of a copy of the award to the applicant, the court shall modify or correct the award when: . . . (3) The award is imperfect in a matter of form, not affecting the merits of the controversy." Second, § 25-2610 provides that the arbitrators may modify or correct an award imperfect in a matter of form upon application of a party "made within twenty days after delivery of the award to the applicant." Because the city did not utilize either of these statutory procedures, the district court correctly determined that its attempt to assert the issue as a defense to confirmation of the award was improper and untimely.

The city also assigns that the district court erred in not determining that the award was inequitable. The district court viewed its power to vacate the arbitration award on substantive grounds as circumscribed by § 25-2613. This statute enumerates specific grounds upon which a court may vacate an arbitration award upon the application of a party filed within 90 days after delivery of a copy of the award to the applicant or if vacation is premised upon "corruption, fraud, or other undue means," within 90 days after such grounds are known or should have been known. § 25-2613(b). The city did not file an application to vacate the award pursuant to § 25-2613. However, the city argues that notwithstanding the provisions of the Uniform Arbitration Act, the district court had common-law authority to review the evidence submitted to the arbitrators to determine "whether or not the award is grossly inequitable." Brief for appellant at 5.

The city relies upon the general principle stated in *Simpson v. Simpson*, 194 Neb. 453, 456, 232 N.W.2d 132, 136 (1975), that "an arbitration award should not be set aside as inequitable unless it is grossly excessive and shocks the conscience of the court." The city argues that our reiteration of this principle in *Babb v. United Food & Commercial Workers Local 271*, 233 Neb. 826, 448 N.W.2d 168 (1989), represents "the common law of arbitration as it exists after the 1987 adoption of the Uniform Arbitration Act." Brief for appellant at 5. This is an incorrect interpretation of *Babb*. The Uniform Arbitration Act applies only to agreements made subsequently to August 30, 1987. § 25-2621. The agreement

to arbitrate which we considered in *Babb* was included in a merger agreement between two labor unions executed on August 12, 1983, and effective September 1 of that year. Although *Babb* was decided after the effective date of the Uniform Arbitration Act, the operative facts occurred prior to that date and the opinion makes no reference to the act.

The role of the court in the post-1987 arbitration process is specifically addressed and limited by the Uniform Arbitration Act. Section 25-2618(a) provides: "The term court shall mean any district court of this state. The making of an agreement described in section 25-2602.01 providing for arbitration in this state confers jurisdiction on the court to enforce the agreement under the Uniform Arbitration Act and to enter judgment on an award thereunder." Section 25-2612 provides: "Within sixty days of the application of a party, the court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in sections 25-2613 and 25-2614."

[3] As noted, in this case, the city did not file an application to modify or correct the award pursuant to § 25-2614, nor did it file an application to vacate the award pursuant to § 25-2613. Moreover, § 25-2613 does not include any authorization for a court to vacate an arbitration award on grounds that it is excessive or inequitable. Section 25-2613(a)(6) specifically provides: "The fact that the relief was such that it could not or would not be granted by a court of law or equity is not [a] ground for vacating or refusing to confirm the award." As we recently stated:

Appellate review of an arbitrator's award is necessarily limited because "to allow full scrutiny of such awards would frustrate the purpose of having arbitration at all—the quick resolution of disputes and the avoidance of the expense and delay associated with litigation." . . . "[S]trong deference [is] due an arbitral tribunal." . . . Furthermore, "[w]hen . . . parties [agree] to arbitration, they [agree] to accept whatever reasonable uncertainties might arise from the process.'"

(Citations omitted.) *Jones v. Summit Ltd. Partnership Five*, 262 Neb. 793, 798, 635 N.W.2d 267, 271 (2001). Furthermore, "[w]here arbitration is contemplated the courts are not equipped to provide the same judicial review given to structured judgments

defined by procedural rules and legal principles. Parties should be aware that they get what they bargain for and that arbitration is far different from adjudication.’ ” *Id.* at 799, 635 N.W.2d at 272. The city’s second assignment of error is without merit.

CONCLUSION

The record reflects that the parties entered into a valid and binding agreement to arbitrate their dispute which was governed by the provisions of Nebraska’s Uniform Arbitration Act. The city did not file an application to vacate, modify, or correct the award pursuant to the act, and therefore the district court correctly concluded that the award should be confirmed. The district court’s entry of judgment on the award in favor of the Hartmans and against the City of Grand Island in the amount of \$100,000 is affirmed.

AFFIRMED.

MURIEL H. NYE AND CHARLES A. NYE, APPELLANTS, V.
FIRE GROUP PARTNERSHIP, A NEBRASKA
GENERAL PARTNERSHIP, APPELLEE.
657 N.W.2d 220

Filed March 7, 2003. No. S-02-543.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. _____. If a genuine issue of fact exists, summary judgment may not properly be entered.
3. **Adverse Possession: Proof: Time.** A party claiming title through adverse possession must prove by a preponderance of the evidence that the adverse possessor has been in (1) actual, (2) continuous, (3) exclusive, (4) notorious, and (5) adverse possession under a claim of ownership for the statutory period of 10 years.
4. **Adverse Possession: Notice.** The acts of dominion over land allegedly adversely possessed must, to be effective against the true owner, be so open, notorious, and hostile as to put an ordinarily prudent person on notice of the fact that the lands are in adverse possession of another.
5. **Adverse Possession.** If an occupier’s physical actions on the land constitute visible and conspicuous evidence of possession and use of the land, that will generally be sufficient to establish that possession was notorious.

6. _____. Although enclosure of land renders the possession of land open and notorious, and tends to show that it is exclusive, it is not the only way by which possession may be rendered open and notorious.
7. _____. Nonenclosing improvements to land, such as erecting buildings or planting groves or trees, which show an intention to appropriate the land to some useful purpose are sufficient to show open and notorious possession.
8. **Adverse Possession: Title.** Title cannot be acquired by adverse possession without the simultaneous and continuous existence of each element of adverse possession for the required 10-year period.
9. **Words and Phrases.** The term “continuous” means uninterrupted and stretching on without break or interruption.
10. **Adverse Possession.** The law of adverse possession does not require the possession to be evidenced by persons remaining continuously upon the land and constantly from day to day performing acts of ownership, and it is sufficient if the land is used continuously for the purposes to which it may be naturally adapted.
11. _____. Where both parties have used the property in dispute, there can be no exclusive possession on the part of one party.
12. _____. The law does not require that adverse possession be evidenced by complete enclosure and 24-hour use of the property.
13. **Adverse Possession: Evidence.** Evidence of adverse possession must show the intention of the claimant to appropriate and use the property as his own to the exclusion of all others.
14. **Adverse Possession: Title.** Permissive use of property can never ripen into title by adverse possession unless there is a change in the nature of possession brought to the attention of the owner in some plain and unequivocal manner that the person in possession is claiming adversely thereby.

Appeal from the District Court for Douglas County:
GERALD E. MORAN, Judge. Reversed and remanded for further proceedings.

Charles A. Nye, pro se, and for appellant Muriel H. Nye.

Ann M. Grottveit and Robert J. Becker, of Stalnaker, Becker,
Buresh, Gleason & Farnham, P.C., for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN,
McCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

Muriel H. Nye and Charles A. Nye appeal from a district court order sustaining the motion for summary judgment filed by the appellee, Fire Group Partnership (Fire Group), on an adverse possession claim. The Nyes presented evidence showing that they mowed a tract of land and erected a snow fence on

the land for more than 10 years. The snow fence was removed seasonally, but the posts were permanently installed. The district court concluded that the Nyes did not adversely possess the property as a matter of law. We determine that there are issues of material fact whether the Nyes' use of the property was open and notorious, whether they exclusively and continuously possessed the property, and whether they possessed the property with permission. Accordingly, we reverse, and remand for further proceedings.

BACKGROUND

On June 9, 2000, the Nyes filed an amended petition seeking to quiet title in a tract of land referred to as "tract 2." Tract 2 is a 24-foot wide strip of land between the Nyes' home and a cornfield to the west of their home. The Nyes alleged that they owned the land because they adversely possessed it for over 10 years. Fire Group filed a motion for summary judgment.

The Nyes presented evidence that when they purchased their property in 1972, they believed that it ended at the edge of an adjacent cornfield and that tract 2 belonged to them. Between 20 and 30 years ago, they planted grass on tract 2. They also mowed the grass on tract 2 for the past 28 years and used part of the tract for collecting and burning dead limbs and grass for more than 10 years. In addition, they used part of it to erect a snow fence that used permanent stakes which were put in place about 20 years ago. The fence was taken down each year in the springtime, but the stakes remained. The record contains a photograph of the fence and of the stakes without the fence attached and shows that the fence was in place on November 7, 1990. The fence was installed near the crop line, and the stakes are about 5 feet high. The Nyes testified that they never saw farm equipment parked or driven on the property. They also testified that they were never asked to remove the snow fence.

Fire Group provided the affidavit of Mickey Gottsch, who farmed the land to the west of the Nyes' property under a lease from Gottsch Enterprises and a sharecrop agreement before it was sold to Fire Group. Although Gottsch testified that he farmed the land for 12 to 15 years, the record contains a deed showing that Gottsch Enterprises purchased the property in

April 1994. Gottsch averred that he deliberately left the grass in place to create a buffer zone between the crops and the Nyes' property so that herbicides would not drift onto the Nyes' property. At a deposition, Gottsch stated that the grass was already on tract 2 when he first began farming there. He stated that he had previously mowed a section of tract 2 both near the road and also up to the snow fence. He testified that once or twice a year, he used the area to park and store farm equipment such as tractors and combines and that the equipment would not make an imprint on the grass. But Gottsch also stated that he parked the equipment to the west of the fenceposts because it would upset the Nyes to park the equipment on the east side of the posts. He stated that he also used tract 2 for turning around his equipment when cultivating.

According to Gottsch, there was one time when the snow fence was still up when it was time to plant crops and the Nyes removed the fence at the request of Gottsch's father. Gottsch, however, at his deposition, stated that the fence was placed in the field and that after the Nyes were contacted, they moved the fence onto tract 2. Without providing details, Gottsch stated that the mowing and erection of the snow fence were done with permission and that these activities never interfered with his use of the land.

The court sustained Fire Group's motion for summary judgment and overruled a motion for summary judgment filed by the Nyes. The court concluded that the seasonal activities of mowing and placing a snow fence could not support a finding that the Nyes were in continuous, exclusive, and notorious possession of tract 2. The court further found that the Nyes used the tract with the permission of the record owners and did not interfere with the farming activities in a manner sufficient to put the record owners on notice of a claim of hostile possession. The Nyes appeal.

ASSIGNMENT OF ERROR

The Nyes assign, rephrased, that the district court erred by granting Fire Group's motion for summary judgment.

STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine

issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Herrera v. Fleming Cos.*, ante p. 118, 655 N.W.2d 378 (2003). If a genuine issue of fact exists, summary judgment may not properly be entered. *McCarson v. McCarson*, 263 Neb. 534, 641 N.W.2d 62 (2002).

ANALYSIS

The Nyes contend that the trial court improperly applied cases involving the seasonal use of property for grazing livestock and hunting to determine that they were not in continuous, exclusive, and notorious possession of tract 2. They further argue there is no evidence that they used tract 2 with permission.

[3] A party claiming title through adverse possession must prove by a preponderance of the evidence that the adverse possessor has been in (1) actual, (2) continuous, (3) exclusive, (4) notorious, and (5) adverse possession under a claim of ownership for the statutory period of 10 years. *Wanha v. Long*, 255 Neb. 849, 587 N.W.2d 531 (1998). The court sustained Fire Group's motion for summary judgment because it determined that the Nyes did not continuously, notoriously, or exclusively use the property, and it determined that they used the property with permission. Accordingly, we do not discuss the elements of actual and adverse possession under a claim of ownership.

NOTORIOUS

[4-7] The court concluded that the Nyes' possession was not notorious. The acts of dominion over land allegedly adversely possessed must, to be effective against the true owner, be so open, notorious, and hostile as to put an ordinarily prudent person on notice of the fact that the lands are in adverse possession of another. *Id.* If an occupier's physical actions on the land constitute visible and conspicuous evidence of possession and use of the land, that will generally be sufficient to establish that possession was notorious. *Id.* Although the enclosure of land renders the possession of land open and notorious, and tends to show that it is exclusive, it is not the only way by which possession may be rendered open and notorious; nonenclosing improvements to land, such as erecting buildings or planting

groves or trees, which show an intention to appropriate the land to some useful purpose, are sufficient. *Id.*

Here the Nyes' use of the land was apparent. They planted grass, mowed and maintained the property, erected a snow fence in the winter, and left the 5- to 6-foot-high fenceposts permanently in place. The record contains evidence that others were aware of the Nyes' use of the property. The court concluded that the Nyes did not interfere with farming activities in a manner sufficient to show hostile possession. But the test does not require a direct interference with activities. Instead, it asks whether there was visible and conspicuous evidence of possession and use of the land. Regardless, the Nyes' act of planting grass on the property necessarily meant that it was not being used for farming. The Nyes do not appeal the denial of their motion for summary judgment, and we do not decide as a matter of law that the Nyes' use of the property was open and notorious. Instead, we conclude that there is an issue of material fact whether the Nyes' use of the property was open and notorious.

CONTINUOUS

Applying *Hardt v. Eskam*, 218 Neb. 81, 352 N.W.2d 583 (1984), a case concerning the use of land for hunting, the court concluded that the Nyes were not in continuous possession of the property because the use of a snow fence and mowing were seasonal. The Nyes contend that the acts of planting the grass, mowing, burning branches, and erecting a snow fence show a continuous use of the property.

[8-10] Title cannot be acquired without the simultaneous and continuous existence of each element of adverse possession for the required 10-year period. See *Wanha v. Long*, *supra*. The term "continuous" means "'uninterrupted . . . stretching on without break or interruption.'" Webster's Third New International Dictionary, Unabridged 493-94 (1968)." *Hardt v. Eskam*, 218 Neb. at 82, 352 N.W.2d at 585. The law does not require the possession to be evidenced by persons remaining continuously upon the land and constantly from day to day performing acts of ownership. *Hardt v. Eskam*, *supra*. It is sufficient if the land is used continuously for the purposes to which it may be naturally adapted. *Id.*

In *Hardt*, the plaintiff hunted on a tract of land and eventually leased hunting rights to others, who built duck blinds on the property. He also grazed cattle in intermittent years on the property and had no records to show which years cattle were present on the property. We determined that the property was suitable for hunting, fishing, and livestock pasture year round. We then determined that because hunting was seasonal, the recreational use of the property was, at best, occasional and limited to a few weeks or months each year. As a result, the plaintiff's actions were not continuous and could not support a claim for adverse possession.

Here, the property is situated between both residential and agricultural land. Thus, the land may be adapted for either residential or agricultural uses. The Nyes used the land in a manner consistent with residential use year round. The Nyes planted grass in the area, which is consistent with the use of the property as part of the yard of their residence. The Nyes then cared for the property by mowing the grass during warm weather, storing and burning tree limbs in the area, and erecting a snow fence. Although mowing and the erection of a snow fence are seasonal activities, unlike in *Hardt v. Eskam*, *supra*, where activity was intermittent for only a few weeks or months of the year, the Nyes used tract 2 as residential property year round. The mowing of the grass during summer and the erection of a snow fence in winter left the property in a continuous state of use for purposes of determining adverse possession. We conclude there is an issue of fact whether the Nyes' use of the property was continuous.

EXCLUSIVE

The court also concluded that Fire Group was entitled to summary judgment because the Nyes did not exclusively use the property. The court's decision appears to rely on Gottsch's testimony that he occasionally parked farm equipment on the property and occasionally used part of the property to turn his machinery around.

[11-13] We have said that where both parties have used the property in dispute, there can be no exclusive possession by one party. *Thornburg v. Haecker*, 243 Neb. 693, 502 N.W.2d 434 (1993). But the law also does not require that adverse possession be evidenced by complete enclosure and 24-hour use of the

property. See, *Rush Creek Land & Live Stock Co. v. Chain*, 255 Neb. 347, 586 N.W.2d 284 (1998); *Young v. Lacy*, 221 Neb. 511, 378 N.W.2d 192 (1985). It is sufficient if the land is used continuously for the purposes to which it may be adapted. *Id.* Evidence must show the intention of the claimant to appropriate and use the property as his own to the exclusion of all others. *Young v. Lacy*, *supra*.

Here, the record contained evidence that Gottsch occasionally parked farm equipment on tract 2, but never to the east of the fenceposts because that would upset the Nyes. He also may have used part of the property on occasion when he turned his machinery around. The Nyes presented evidence that they never saw Gottsch use the property and that they continuously used the property as part of their yard. Thus, the Nyes presented evidence of exclusive use of the property. Whether Gottsch used part of the tract is an issue of material fact relevant to the determination of exclusivity. Further, even if Gottsch occasionally parked machinery on the property and used part of it as a turnaround, the frequency of the use affects a determination of exclusivity. That Gottsch stated that he did not park to the east of the fenceposts because that would upset the Nyes could also lead to the finding that the Nyes adversely possessed part, if not all, of the tract. Under these circumstances, there are issues of material fact affecting the question whether the Nyes exclusively used the property. Finally, the Nyes presented evidence indicating that they might have adversely possessed the property for 10 years before Gottsch began farming it, which would make Gottsch's testimony irrelevant. We conclude that there is an issue of material fact whether the Nyes exclusively possessed the property.

PERMISSION

[14] The court also sustained Fire Group's motion for summary judgment because it determined that the Nyes used the property with permission. Permissive use of property can never ripen into title by adverse possession unless there is a change in the nature of possession brought to the attention of the owner in some plain and unequivocal manner that the person in possession is claiming adversely thereby. *Wanha v. Long*, 255 Neb. 849, 587 N.W.2d 531 (1998).

Here, the only evidence that the Nyes were given permission to use the disputed property was a statement made by Gottsch in which he said the Nyes had permission; but he provided no details. We also read one of Fire Group's arguments to be that Gottsch's occasional use of the property showed that the Nyes were using the property with permission. The Nyes deny that they knew the property belonged to someone else and that they were using it with permission. The record contains a statement that Gottsch's father once asked that the snow fence be removed, but this alone does not constitute an express permission for the Nyes to use the property. The record also contains a statement from Gottsch that the fence was in the field when the Nyes were asked to remove it. Further, the Nyes deny that they were ever asked to remove the fence. Likewise, although evidence shows that Gottsch occasionally parked or drove equipment on the property, the Nyes presented evidence to dispute that. An occasional use of the property by Gottsch does not equate with Gottsch's giving the Nyes permission to use the property. Instead, the occasional use is more relevant to the issue of whether the Nyes exclusively used the property. We conclude there is an issue of material fact whether the Nyes used the property with permission. Thus, the court erred when it granted summary judgment on that determination.

CONCLUSION

We conclude that there are issues of material fact about whether the Nyes' use of the property was open and notorious, whether they exclusively and continuously possessed the property, and whether they possessed the property with permission. We reverse, and remand for further proceedings.

REVERSED AND REMANDED FOR
FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V.
BYRON MARCH, APPELLANT.
658 N.W.2d 20

Filed March 14, 2003. No. S-01-755.

1. **Judgments: Appeal and Error.** When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **Statutes: Legislature: Intent.** The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible.
3. **Motions to Suppress: Notice: Time.** After a ruling granting a motion to suppress has been appealed, the single-judge opinion on the ruling is binding on the trial court and the parties as a determination of the suppression issue in a subsequent trial. However, if the defendant wishes to reopen the motion to suppress, the defendant must (1) put the State and trial court on notice of such intention by filing a new motion to suppress at least 10 days before trial or (2) make a showing that the existence of one of the exceptions provided in Neb. Rev. Stat. § 29-822 (Reissue 1995) excuses the 10-day requirement.
4. **Search Warrants: Affidavits: Probable Cause: Words and Phrases.** A search warrant, to be valid, must be supported by an affidavit which establishes probable cause. Probable cause sufficient to justify issuance of a search warrant means a fair probability that contraband or evidence of a crime will be found.
5. **Search Warrants: Affidavits: Probable Cause: Appeal and Error.** In reviewing the strength of an affidavit submitted as a basis for finding probable cause to issue a search warrant, an appellate court applies a “totality of the circumstances” test. The question is whether, under the totality of the circumstances illustrated by the affidavit, the issuing magistrate had a substantial basis for finding that the affidavit established probable cause.
6. **Search Warrants: Affidavits: Evidence: Appeal and Error.** In evaluating the sufficiency of an affidavit used to obtain a search warrant, an appellate court is restricted to consideration of the information and circumstances contained within the four corners of the affidavit, and evidence which emerges after the warrant is issued has no bearing on whether the warrant was validly issued.
7. **Constitutional Law: Search and Seizure: Search Warrants: Affidavits: Probable Cause.** Although it may be necessary to excise certain matter from an affidavit, if the remainder of the affidavit is sufficient to establish probable cause, the warrant issued upon such remaining information in the affidavit will be proper and the results of the search pursuant to the warrant are constitutionally obtained.
8. **Search and Seizure: Search Warrants: Probable Cause: Proof.** A search conducted pursuant to a search warrant supported by probable cause is generally considered to be reasonable, and it is a defendant’s burden to prove that the search or seizure was unreasonable.
9. **Search Warrants: Affidavits: Probable Cause.** The magistrate who is evaluating the probable cause question must make a practical, commonsense decision whether,

given the totality of the circumstances set forth in the affidavit before him or her, including the veracity of and basis of knowledge of the persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Petition for further review from the Nebraska Court of Appeals, IRWIN, Chief Judge, and INBODY and CARLSON, Judges, on appeal thereto from the District Court for Scotts Bluff County, RANDALL L. LIPPSTREU, Judge. Judgment of Court of Appeals affirmed.

James R. Mowbray and Kelly S. Breen, of Nebraska Commission on Public Advocacy, for appellant.

Don Stenberg, Attorney General, and Kimberly A. Klein for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, McCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

Byron March was convicted in the district court for Scotts Bluff County of two counts of first degree assault and one count of burglary. March was sentenced to 8 to 16 years' imprisonment on one first degree assault conviction, 2 to 4 years' imprisonment on the second first degree assault conviction to be served consecutively, and 1 to 2 years' imprisonment on the burglary conviction to be served concurrently with the other sentences. During the early stages of the proceedings, the trial court granted March's motion to suppress evidence located during execution of a search warrant, but such ruling was reversed by a single judge of the Nebraska Court of Appeals pursuant to the authority contained in Neb. Rev. Stat. § 29-824 (Cum. Supp. 2002). Following trial, March appealed his convictions and the denial of his motion to suppress to the Court of Appeals. The Court of Appeals affirmed, and we granted March's petition for further review. We affirm.

STATEMENT OF FACTS

In the early hours of November 30, 1999, Officer Ken Webber and another officer were called to a Scottsbluff motel to deal

with a noise disturbance. They discovered a loud party going on in room 243. Upon entering the room, the officers noticed March arguing with another man. They told the occupants of the room that the party was over and directed the occupants to cease making noise. The officers then left the motel.

Within 2 hours, the officers and two additional officers were called back to the motel to investigate a report of a “dead woman” in room 132. They observed that the door to room 132 was damaged and appeared to have been forced open. Inside the room, they found a male victim on the floor with blood around his head. Upon examining the man’s head, they noted an impression of a shoe sole with a “Nike Air” trademark. The officers also found a female victim who was not dead but had a large amount of blood around her head, was nude from the waist down, and appeared to have been sexually assaulted.

The officers spoke with three individuals who said they had been partying in room 132 with the two victims. One of the three individuals was a man who had earlier been seen arguing with March at the party in room 243. The three said they left the motel to get cigarettes and returned approximately 20 minutes later to find the two victims bleeding on the floor. The officers observed no bloodstains on the three witnesses’ clothing.

The officers decided to search for a shoe with a sole pattern similar to the impression on the male victim’s head and focused their search on people who were at the party in room 243. While questioning occupants of room 243 and others who had been at the party, Webber inquired as to the whereabouts of the “big white guy,” later identified as March, who had been arguing at the party. He was told March was staying in room 258.

Webber and two other officers went to room 258 to question March. When they arrived, they noticed the door was partially open. When Webber knocked on the door, the door opened 6 to 8 inches, and another officer observed someone, later identified as March, lying on the bed. Webber shouted “‘police department’ ” into the room a couple times and received no response. Fearing another possible victim, the officers entered the room. As the facts evolved, March proved not to be a victim.

Sometime after entering the room, Webber noticed that the shower area was wet and saw a blood smear on the shower

curtain. In ruling on the motion to suppress, the trial court found that these observations were made after March's well-being had been ascertained, whereas the single judge of the Court of Appeals determined that such observations occurred before March's condition was assessed. Webber testified that he approached March and noticed his hair was wet and he had a cut on his hand.

After attempting to rouse March, Webber observed an unzipped duffelbag containing a pair of white underwear which appeared to be bloodstained. Another officer saw a shoe that appeared to be bloodstained. The officer picked up the shoe and showed the sole pattern to a third officer who said the pattern looked similar to the impression on the male victim's head. The second officer took the shoe to room 132 to show it to the fourth officer who agreed that the sole pattern was similar to the impression on the male victim's head. The second officer returned to March's room and placed March under arrest. An affidavit for a search warrant was prepared, essentially containing the facts recited above. On the basis of the affidavit, a search warrant was subsequently issued for a search of March's room and numerous items of evidence were found which linked March to the crimes committed in room 132.

March was charged with first degree sexual assault, two counts of first degree assault, and burglary. Prior to trial, March moved to suppress evidence obtained from his motel room pursuant to the search warrant. The trial court granted the motion. The State filed an interlocutory appeal to a single judge of the Court of Appeals pursuant to the provisions of § 29-824, and the single judge reversed. *State v. March*, No. A-00-445, 2000 WL 1252056 (Neb. App. Sept. 5, 2000) (not designated for permanent publication).

The single judge and the trial court both determined that the officers had lawfully entered March's room under the emergency exception to the warrant requirement. They also both agreed that once the officers discovered that no emergency existed, they had a duty to retreat, and that therefore, the subsequent search of March's duffelbag and the seizure of his shoes were illegal and must be excised from the affidavit in support of the search warrant. In our analysis below regarding

the sufficiency of the affidavit, we treat the evidence of the contents of the duffelbag and the shoes as having been excised.

The trial court and the single judge diverged in their determinations regarding when Webber observed the wet shower area and the blood smear on the shower curtain. The trial court had found that the observations had been made sometime after the initial entry and assessment of March's condition and that thus, the product of those observations was not properly obtained. In contrast, the single judge determined that the evidence from the hearing on the motion to suppress "conclusively establishe[d]" that the observations of the bathroom area were made as Webber entered the room and was headed toward March. *State v. March*, No. A-00-445, 2000 WL 1252056 at *9. Because the trial court excised these observations from the affidavit, it found no probable cause for the issuance of the search warrant and had therefore ruled to suppress the evidence obtained from the execution of the search warrant. The single judge, however, determined that Webber's observations of the wet shower and the blood smear on the shower curtain as well as the cut on March's hand could be used in assessing the sufficiency of the affidavit in support of the search warrant and that with the inclusion of these facts, probable cause for issuance of the search warrant existed. According to the single judge, the evidence located as a result of execution of the search warrant was properly obtained. The single judge therefore reversed the trial court's order which had granted the motion to suppress.

At this point, March filed a motion for a rehearing in the Court of Appeals. The Court of Appeals concluded that a motion for a rehearing is permitted only where the underlying opinion is by "the court," that a single-judge opinion is not an opinion of "the court," and that therefore, the motion for rehearing was not authorized. The motion for rehearing was stricken. *State v. March*, 9 Neb. App. 907, 622 N.W.2d 694 (2001). See, also, *State v. Chambers*, 242 Neb. 124, 493 N.W.2d 328 (1992).

During the subsequent bench trial, March attempted to raise the issues first raised in his motion to suppress. In this connection, March offered exhibit 64, consisting of two pages from a multipage police report prepared by Webber on November 30, 1999. While making the offer, counsel for March stated that

exhibit 64 was not offered as evidence for trial but solely in connection with the issues encompassed by the motion to suppress and represented that “[t]his report wasn’t available to the defense at the — on the date of the Motion to Suppress hearing, it was later provided.” Contrary to Webber’s testimony at the suppression hearing and at trial, the report indicated that Webber had not observed the wet shower and the blood smear on the shower curtain until some time after he had approached March and tried to rouse March. The timing of these observations is not explicit in the affidavit in support of a search warrant. The trial court refused to admit the report into evidence, stating, “I’m going to overrule the Motion to Suppress and I’m going to show that the Exhibit 64 was not received because, as I understand it, [March is] offering it just in support of the Motion to Suppress.”

The trial court subsequently convicted March of two counts of first degree assault and one count of burglary but dismissed the count of first degree sexual assault due to insufficient proof. March was sentenced to 8 to 16 years’ imprisonment on one assault conviction, 2 to 4 years’ imprisonment on the second assault conviction to be served consecutively to the first, and 1 to 2 years’ imprisonment on the burglary conviction to be served concurrently with the other sentences.

March appealed to the Court of Appeals and argued (1) that both the trial court and the single judge of the Court of Appeals erred in determining that the emergency doctrine justified the officers’ warrantless entry into March’s room, (2) that the single judge of the Court of Appeals erred in ruling that the trial court’s factual findings regarding the timing of Webber’s observations of the wet shower and the blood smear were clearly erroneous, and (3) that the trial court erred in refusing to admit exhibit 64 into evidence at trial in connection with March’s earlier motion to suppress.

In an unpublished opinion, *State v. March*, No. A-01-755, 2002 WL 31300046 (Neb. App. Oct. 15, 2002) (not designated for permanent publication), the Court of Appeals concluded (1) that neither the trial court nor the single judge erred in finding that the warrantless entry was justified by the emergency exception, (2) that the single judge did not err in determining that the

trial court's finding regarding the timing of Webber's observations of the bathroom was clearly erroneous, and (3) that because March failed to file a second motion to suppress following the single judge's ruling at least 10 days before trial as required under Neb. Rev. Stat. § 29-822 (Reissue 1995), March was not entitled to present new evidence at trial in support of the motion to suppress. March petitioned this court for further review, and we granted his petition.

ASSIGNMENTS OF ERROR

In petitioning for further review, March assigns two errors to the Court of Appeals, which we restate as follows: (1) that the Court of Appeals erred in affirming the denial of the motion to suppress based on the reasoning of the single judge of the Court of Appeals and (2) that the Court of Appeals erred in affirming the trial court's refusal to admit exhibit 64 and further erred by holding that March was required but failed to file a new motion to suppress at least 10 days before trial in order to present new evidence in support of the suppression issue.

STANDARD OF REVIEW

[1] When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *State v. Birge*, 263 Neb. 77, 638 N.W.2d 529 (2002).

ANALYSIS

*Necessity to Renew Motion to Suppress Under § 29-822:
Exclusion of Exhibit 64.*

We first address March's second assignment of error in which he claims that the Court of Appeals erred in holding that under § 29-822, he was required to file a second motion to suppress at least 10 days before trial in order to present the additional evidence of exhibit 64 in support of the suppression issues raised in his original motion to suppress. We agree with the Court of Appeals that under § 29-822, March waived reconsideration of the suppression issue at trial when he failed to file a new motion to suppress at least 10 days before trial and further failed to demonstrate good cause or surprise to excuse such failure. Thus, the trial court's refusal to admit exhibit 64, as affirmed by the

Court of Appeals, was not error, and we reject this assignment of error on further review.

After the trial court originally granted March's motion to suppress in this case, the State appealed the trial court's decision to a single judge of the Court of Appeals pursuant to § 29-824. The single judge reversed the trial court's order of suppression. Section 29-824(2) provides that upon trial following the order of a single judge "the parties and the trial court shall be bound by such order."

With regard to a felony charge, § 29-822 provides that a motion to suppress evidence obtained by an allegedly unlawful search and seizure "must be filed at least ten days before trial or at the time of arraignment, whichever is the later, unless otherwise permitted by the court for good cause shown." The statute further provides that

the court may entertain such motions to suppress after the commencement of trial where the defendant is surprised by the possession of such evidence by the state, and also may in its discretion then entertain the motion where the defendant was not aware of the grounds for the motion before commencement of the trial.

This court has previously held that "[i]t is clearly the intention of section 29-822 . . . that motions to suppress evidence are to be ruled on and finally determined before trial, even to permit an appeal before trial from an order suppressing evidence unless within the exceptions contained in the statute." *State v. Smith*, 184 Neb. 363, 369, 167 N.W.2d 568, 572 (1969). In *Smith*, this court noted that the finality indicated by § 29-822 was not "paramount to the long-recognized right of trial courts to correct their errors during term time" and therefore stated that § 29-822 "intends, unless within the exceptions contained in the statute, that motions to suppress evidence should be finally determined before trial, but that a trial court is not precluded from correcting errors at the trial." 184 Neb. at 369-70, 167 N.W.2d at 572.

[2,3] The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible. *State v. Rhea*, 262 Neb. 886, 636 N.W.2d 364

(2001). Sections 29-822 and 29-824 are part of a series of statutes pertaining to motions to suppress. Section 29-822 provides, with certain exceptions, that motions to suppress be finally determined before trial, and § 29-824 provides that single-judge rulings on motions to suppress are binding on the trial court and parties in a subsequent trial. Construing these statutes together, we conclude that after a ruling granting a motion to suppress has been appealed, the single-judge opinion on the ruling is binding on the trial court and the parties as a determination of the suppression issue in a subsequent trial. However, if the defendant wishes to reopen the motion to suppress, the defendant must (1) put the State and trial court on notice of such intention by filing a new motion to suppress at least 10 days before trial or (2) make a showing that the existence of one of the exceptions provided in § 29-822 excuses the 10-day requirement.

In the present case, following the single judge's order, contrary to § 29-822, March failed to file a new motion to suppress at least 10 days before trial. At trial, March made no showing of good cause to excuse his failure to file a new motion prior to trial, nor did he demonstrate surprise. March merely requested that exhibit 64 be admitted for consideration in connection with his original motion to suppress.

We note that exhibit 64 identified at trial consists of pages 9 and 10 of the investigative report prepared by Webber on November 30, 1999. We further note that at the suppression hearing conducted nearly 1½ years prior to trial, March used exhibit 5, consisting in part of pages six, seven, and eight of the same investigative report, to refresh Webber's memory. Given March's awareness of pages six, seven, and eight of the report at the time of the suppression hearing, we cannot say that March was "surprised by the [State's] possession of" pages 9 and 10 of the same report or that March "was not aware of the grounds for the motion before commencement of the trial," and we therefore cannot say that March showed good cause under § 29-822 to excuse his failure to file a new motion to suppress at least 10 days before trial. We therefore conclude that the Court of Appeals did not err in determining that the trial court did not err in refusing to admit exhibit 64 into evidence at trial, because March failed to timely file a new motion to suppress.

Denial of Motion to Suppress.

Although, as concluded above, March waived reconsideration of the suppression issue at trial, the single-judge opinion denying his motion to suppress was open to review before the Court of Appeals in connection with the appeal of March's convictions. Section 29-824(2) provides that "[u]pon conviction after trial the defendant may on appeal challenge the correctness of the order by the judge." In the context of § 29-824, we read "the order by the judge" to refer to the ruling of the single judge. It was therefore appropriate on appeal to the Court of Appeals for March to challenge the single judge's reasoning directing the denial of his motion to suppress. On further review, March claims that the Court of Appeals erred in affirming the denial of his motion to suppress. Albeit for reasons different from those expressed by the Court of Appeals, we conclude that the denial of the motion to suppress, as affirmed by the Court of Appeals, was correct, and we reject this assignment of error.

In the instant case, the protections of the Fourth Amendment to the U.S. Constitution to be free from unreasonable search and seizure extended to March's motel room. See *Stoner v. California*, 376 U.S. 483, 84 S. Ct. 889, 11 L. Ed. 2d 856 (1964). Under the facts of this case, the initial entrance of the police into March's room without a warrant was proper due to exigent circumstances. See *State v. Illig*, 237 Neb. 598, 467 N.W.2d 375 (1991). In ascertaining March's condition, the officers legitimately observed that March had a cut on the knuckle of his right hand. This fact was properly included in the affidavit in support of the search warrant. Upon discovering that March was not injured, the justification for the officers' presence in March's room ceased to exist.

On appeal to the Court of Appeals and on further review to this court, March takes issue with the single judge's finding that Webber saw the wet shower area and the blood smear on the shower curtain before he ascertained March's condition and that such observations were properly included in the affidavit. With such observations included, the single judge determined that the affidavit supported the issuance of the search warrant. March disagrees with the determination of the Court of Appeals and argues that the trial court correctly found that the observations regarding the bathroom occurred after Webber had ascertained

March's condition and that therefore such observations should have been excised from the affidavit.

The affidavit in support of the search warrant gives a lengthy account of the events at the motel on November 29 and 30, 1999. Included are details regarding the disturbances, the threatened altercation, the individuals involved, and the discovery of the victims and their conditions. Properly included in the affidavit is the specific information regarding the fresh cut to March's knuckle. We evaluate the sufficiency of the affidavit to determine if it supports issuance of the search warrant of March's room.

[4] A search warrant, to be valid, must be supported by an affidavit which establishes probable cause. *State v. Faber*, 264 Neb. 198, 647 N.W.2d 67 (2002). Probable cause sufficient to justify issuance of a search warrant means a fair probability that contraband or evidence of a crime will be found. *Id.*

[5,6] In reviewing the strength of an affidavit submitted as a basis for finding probable cause to issue a search warrant, an appellate court applies a "totality of the circumstances" test. The question is whether, under the totality of the circumstances illustrated by the affidavit, the issuing magistrate had a substantial basis for finding that the affidavit established probable cause. *State v. Ortiz*, 257 Neb. 784, 600 N.W.2d 805 (1999). In evaluating the sufficiency of an affidavit used to obtain a search warrant, an appellate court is restricted to consideration of the information and circumstances contained within the four corners of the affidavit, and evidence which emerges after the warrant is issued has no bearing on whether the warrant was validly issued. *State v. Myers*, 258 Neb. 272, 603 N.W.2d 390 (1999).

[7,8] Although it may be necessary to excise certain matter from an affidavit, if the remainder of the affidavit is sufficient to establish probable cause, the warrant issued upon such remaining information in the affidavit will be proper and the results of the search pursuant to the warrant are constitutionally obtained. *State v. Faber, supra*. A search conducted pursuant to a search warrant supported by probable cause is generally considered to be reasonable, and it is a defendant's burden to prove that the search or seizure was unreasonable. *State v. Ortiz, supra*.

We have reviewed the affidavit in support of the search warrant, and we conclude that even if we excise the statements

regarding the bathroom and shower curtain, as March suggests, the remaining information contained in the affidavit was sufficient to support issuance of the search warrant for March's motel room. As reflected in the affidavit, before the police entered March's room, they had gathered evidence that March had been involved in an argument with a man who was staying in the same room as the victims. They also had gathered evidence which indicated that the perpetrator of the assaults was likely one of the people who had been at the party earlier in the night. The police had also gathered evidence which indicated that other people who were at the party had not committed the assaults. During the time the officers' presence in March's room was covered by the emergency doctrine, Webber observed that March had a cut on his knuckle.

[9] The magistrate who is evaluating the probable cause question must make a practical, commonsense decision whether, given the totality of the circumstances set forth in the affidavit before him or her, including the veracity of and basis of knowledge of the persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *State v. Ildefonso*, 262 Neb. 672, 634 N.W.2d 252 (2001). Excluding the observations of the bathroom, the recitations properly included in the affidavit indicated a fair probability that evidence of a crime would be found in March's motel room, and the affidavit was sufficient to support the issuance of the search warrant. We therefore conclude that the Court of Appeals did not err in affirming the denial of the motion to suppress.

CONCLUSION

We conclude that March waived reconsideration of the suppression issue at trial when, contrary to § 29-822, he failed to file a new motion to suppress at least 10 days before trial and failed to demonstrate either good cause or surprise to excuse his failure. We further conclude that, even excising the information regarding the officers' observations of March's motel bathroom, the affidavit in support of the search warrant in this case was sufficient to justify issuance of the warrant and that the denial of March's motion to suppress evidence obtained thereby was proper. We

therefore affirm the Court of Appeals' decision which affirmed the denial of March's motion to suppress and March's convictions.

AFFIRMED.

NATALIE K. SCHUMAN, APPELLANT AND CROSS-APPELLEE, V.
BRADLEY W. SCHUMAN, APPELLEE AND CROSS-APPELLANT.
658 N.W.2d 30

Filed March 14, 2003. No. S-01-904.

1. **Property Division: Appeal and Error.** The division of property is a matter entrusted to the discretion of the trial judge, which will be reviewed de novo on the record and will be affirmed in the absence of an abuse of discretion.
2. **Divorce: Appeal and Error.** In a review de novo on the record of an action for dissolution of marriage, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue.
3. **Divorce: Property Division: Taxes.** In assigning a value to a business for purposes of dividing the property in an action for dissolution of marriage, a trial court should not consider the tax consequences of the sale of the business unless there is a finding by the court that the sale of the business is reasonably certain to occur in the near future. However, the court may consider such tax consequences if it finds that the property division award will, in effect, force a party to sell his or her business in order to meet the obligations imposed by the court.
4. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
5. **Appeal and Error.** When evidence is in conflict, an appellate court may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
6. **Corporations: Valuation.** A trial court's valuation of a closely held corporation is reasonable if it has an acceptable basis in fact and principle.
7. **Property Division: Proof.** The burden of proof to show that property is a non-marital asset remains with the person making the claim.
8. **Divorce: Property Division: Joint Tenancy: Case Disapproved.** To the extent that *Gerard-Ley v. Ley*, 5 Neb. App. 229, 558 N.W.2d 63 (1996), can be interpreted to mean that nonmarital property which during a marriage is titled in joint tenancy cannot be considered as a nonmarital asset in an action for dissolution of marriage, such interpretation is expressly disapproved.
9. **Property Division: Alimony.** How property inherited by a party before or during a marriage will be considered in determining the division of property or an award of alimony must depend upon the facts of the particular case and the equities

involved. If the inheritance can be identified, it is to be set off to the inheriting spouse and eliminated from the marital estate.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Affirmed in part, and in part reversed and remanded with directions.

Abbie J. Widger and Stefanie J. Flodman, of Johnson, Flodman, Guenzel & Widger, for appellant.

Karin O'Connell for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

NATURE OF CASE

Natalie K. Schuman appeals from a decree entered by the district court for Lancaster County which dissolved her marriage to Bradley W. Schuman and divided the marital estate. Bradley cross-appeals. Both parties assert that the court erred in its valuation and division of the marital estate.

SCOPE OF REVIEW

[1] The division of property is a matter entrusted to the discretion of the trial judge, which will be reviewed de novo on the record and will be affirmed in the absence of an abuse of discretion. *Pawlusiak v. Pawlusiak*, 264 Neb. 1, 645 N.W.2d 773 (2002).

[2] In a review de novo on the record of an action for dissolution of marriage, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue. See *Bauerle v. Bauerle*, 263 Neb. 881, 644 N.W.2d 128 (2002).

FACTS

Bradley and Natalie were married on September 14, 1984. Four children were born during the marriage, all of whom were minors at the time of the dissolution proceedings. During the marriage, Natalie home-schooled the children and was not employed outside the home. Since 1982, Bradley has owned Hruska-Schuman Company, Inc. (Hruska-Schuman), a business

which sells and installs gutters, wood-burning stoves, and fire-place parts and accessories.

Natalie filed a petition for dissolution of the marriage, and the parties entered into a partial property settlement agreement. Custody of the children was to be awarded to Natalie subject to rights of “parenting time” for Bradley. The parties agreed to the valuation and division of various items of property. The present value of Hruska-Schuman and the real estate upon which it is located and the premarital value of the business were decided by the district court. The court also awarded Natalie possession of 30.57 acres of property in Saunders County.

Bradley purchased Hruska-Schuman for \$150,000 on March 31, 1982. He made a \$35,000 downpayment on the business with personal funds and a loan from his parents. He financed the balance of the purchase price with a small business loan. In 1994, Hruska-Schuman suffered a fire and was the victim of an embezzlement, which left the business with little to no value. Bradley built Hruska-Schuman back to its present value, and at the time of the dissolution proceedings, he managed the business and installed gutters and fireplaces.

The building in which the business is located has a total area of 6,800 square feet, including 1,020 for an office and reception area and 5,780 for a service and warehouse area. Wayne Kubert, Natalie’s real estate appraiser, considered the building as containing retail space and a showroom. Kubert used three approaches in his appraisal: the cost approach, the income approach, and the sales comparison approach. Using these three approaches, Kubert valued the real estate at \$225,000.

Gary Hassebrook, Bradley’s real estate appraiser, used the same three basic approaches. However, Hassebrook evaluated the property as being used primarily as a warehouse rather than for retail. Hassebrook concluded that valuing the property as retail space would overstate the value. He valued the property at \$160,000.

James Watts, a certified public accountant, testified to the value of Hruska-Schuman. Watts reviewed the corporate income tax returns, the workpapers of the accountant who prepared the returns, the accountant’s analysis and income tax considerations, and the personal income tax returns of the parties. He utilized a

historical analysis of the trends of Hruska-Schuman's income for the past 3 years, reviewed the real estate appraisal, examined the income tax returns, and determined the normalized earnings. In his valuation, Watts used the excess earnings method of valuation. Relying in part on the real estate appraisal of Kubert, Watts valued Hruska-Schuman at \$308,000. He did not consider the income tax consequences of a future sale of Hruska-Schuman.

Bradley's accountant, Dennis Stara, used Watts' valuation to calculate the estimated income taxes that would result from a future sale of Hruska-Schuman. Relying in part on Kubert's real estate appraisal, Stara concluded that Hruska-Schuman had a value of \$161,872 after taxes. Relying in part on Hassebrook's real estate appraisal, Stara concluded that the business had a value of \$135,024 after taxes.

The district court determined the value of Hruska-Schuman to be \$135,000. In determining the value of the business, the court assumed a future sale and the tax consequences of such sale. The court further reduced the value of the business by \$35,000 to account for the funds Bradley put into the business prior to the marriage.

In 1994, the parties purchased 30.57 acres of land in Saunders County for \$60,000. The acreage was held in joint tenancy by the parties. At trial, Natalie testified that she wanted the acreage so she and the children could eventually live there. Both parties testified that they spent time at the acreage with the children. Natalie said she raised bees and harvested hay on the property. Bradley stated that he spent time at the acreage fishing with the children. Bradley said he had made various improvements, including installing a gate, repairing a fence, removing stones, filling badger holes, and helping the children build a treehouse. The district court found that the acreage was part of the marital estate and awarded the acreage to Natalie. In order to equalize the division of marital assets and debts, the court ordered Natalie to pay Bradley \$11,399.50.

ASSIGNMENTS OF ERROR

Natalie assigns, restated, that the district court erred in (1) considering the tax consequences of the sale of Hruska-Schuman, (2) reducing the value of the marital estate for taxes that may have to

be paid at some date in the future, (3) not considering a certain loan due and owing to Bradley, (4) finding the value of Hruska-Schuman should be reduced by \$35,000 as the amount Bradley contributed to the business prior to the marriage, (5) determining the real estate on which Hruska-Schuman is located has a value of \$160,000, (6) finding the marital value of Hruska-Schuman to be \$100,000, and (7) ordering Natalie to pay Bradley \$11,399.50.

On cross-appeal, Bradley assigns, restated, that the district court erred in (1) failing to award the real property in Saunders County to him and (2) failing to set off \$53,000 as separate property which Bradley paid to purchase the acreage and which was an inheritance from his mother.

ANALYSIS

We first consider (1) whether the district court erred in considering the tax consequences of the sale of the business, thereby reducing the value of the business by the amount of taxes that might have to be paid at some date in the future, and (2) whether the court erred in determining the value of the loan which it assigned as an asset to Bradley.

As a part of our analysis, we have concluded that the district court used the values contained in the "Joint Property Statement" which was marked and received as exhibit 7. Based on our review of exhibit 7, the partial property settlement agreement, and the decree of dissolution, we determine that the district court awarded and valued the property as follows:

<u>PROPERTY</u>	<u>NATALIE</u>	<u>BRADLEY</u>
Duplex	\$123,500	
Hruska-Schuman		\$100,442
Personal property	2,000	2,000
1995 Suburban	14,500	
Horse, donkey, and related items	500	
1997 Charger boat		14,000
30.57 acres	60,000	
Hruska-Schuman loan		7,259
Mortgage on duplex	(54,000)	
TOTALS	<u>\$146,500</u>	<u>\$123,701</u>

The court found that the difference in value of the property was \$22,799. It divided this amount in half and ordered Natalie to pay \$11,399.50 to Bradley in three equal annual installments.

Natalie claims that the district court erred by considering the tax consequences of the sale of Hruska-Schuman. She argues that it was inappropriate to consider such tax consequences when Bradley did not intend to sell the business, the court did not order the sale of the business, and the record did not indicate that the sale of the business would occur within a short period of time. She claims that any tax consequences from such sale are speculative and not reasonably predictable.

The district court found that the tax consequences of a future sale of the business should be taken into account when determining its present value. The court reasoned it would not be equitable to allow Natalie to derive only the benefits of the growth of the business and not assume her share of the risks involved in the growth of the business throughout the marriage.

The district court relied on *Buche v. Buche*, 228 Neb. 624, 423 N.W.2d 488 (1988), to support its decision to reduce the marital estate for taxes that would eventually have to be paid as a result of the sale of the business. *Buche* involved the valuation of an IRA in the division of marital property. We concluded that income tax would eventually have to be paid on the IRA and that, therefore, it was proper to consider the future tax consequences in determining the present value of the IRA.

Natalie argues that *Buche* is distinguishable because we also determined it was improper to consider a penalty which would have had to be paid if the respondent withdrew the IRA. We concluded that since the IRA was not going to be withdrawn, the penalty was to be disregarded. However, since it was certain that income tax would eventually have to be paid on the IRA, we considered the future tax consequences in our valuation. Natalie argues in the instant case that there is no evidence that Hruska-Schuman is going to be sold and that, therefore, we should not consider the tax consequences of the sale for the same reasons we did not consider the penalty consequences in *Buche*.

We have not previously addressed whether tax consequences resulting from the sale of a business should be considered in the division of marital property. The majority of courts that have

addressed this issue have generally refused to consider the tax consequences of the sale of a business unless there is evidence that a sale is contemplated or reasonably certain to occur. See *Bidwell and Bidwell*, 170 Or. App. 239, 12 P.3d 76 (2000).

In *Mathew v. Palmer*, 8 Neb. App. 128, 589 N.W.2d 343 (1999), the Nebraska Court of Appeals concluded that a deduction in value for income tax on stock which was not due to be sold in the foreseeable future was clearly speculative. See, also, *In re Marriage of Fonstein*, 17 Cal. 3d 738, 552 P.2d 1169, 131 Cal. Rptr. 873 (1976) (holding trial court erred by taking into account tax consequences which might result to husband in event he subsequently decided to convert his interest in law partnership into cash, in absence of any indication that husband was withdrawing from partnership, was required to withdraw, or intended to withdraw); *England v. England*, 626 So. 2d 330 (Fla. App. 1993) (finding trial court abused its discretion by considering tax consequences of sale of business when there was no evidence that sale of business was imminent or even contemplated); *Cohen v. Cohen*, 73 S.W.3d 39 (Mo. App. 2002) (concluding trial court did not abuse its discretion by failing to consider tax consequences of sale of parties' art business when evidence did not support necessity of such sale and court did not order such sale); *Kudela v. Kudela*, 277 A.D.2d 1015, 716 N.Y.S.2d 231 (2000) (stating trial court is not required to consider tax consequences of sale of business property when there is no evidence that business property would have to be sold); *Arbuckle v. Arbuckle*, 22 Va. App. 362, 470 S.E.2d 146 (1996) (holding tax consequences of hypothetical sale of husband's dental practice were too speculative without evidence that sale would occur in near future); *In re Hay*, 80 Wash. App. 202, 907 P.2d 334 (1995) (holding that if tax consequences of sale of parties' real estate partnership are imminent, or arise directly from trial court's property disposition, and amount is not speculative, such consequences are properly considered in valuing marital assets).

[3] We conclude that in assigning a value to a business for purposes of dividing the property in an action for dissolution of marriage, a trial court should not consider the tax consequences of the sale of the business unless there is a finding by the court that

the sale of the business is reasonably certain to occur in the near future. However, the court may consider such tax consequences if it finds that the property division award will, in effect, force a party to sell his or her business in order to meet the obligations imposed by the court.

[4] The division of property is a matter entrusted to the discretion of the trial judge, which will be reviewed *de novo* on the record and will be affirmed in the absence of an abuse of discretion. *Pawlusiak v. Pawlusiak*, 264 Neb. 1, 645 N.W.2d 773 (2002). A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *McLaughlin v. McLaughlin*, 264 Neb. 232, 647 N.W.2d 577 (2002). We will, therefore, review the district court's consideration of the tax consequences for an abuse of discretion.

[5,6] In a review *de novo* on the record of an action for dissolution of marriage, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue. See *Bauerle v. Bauerle*, 263 Neb. 881, 644 N.W.2d 128 (2002). However, when evidence is in conflict, the appellate court may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. See *Noonan v. Noonan*, 261 Neb. 552, 624 N.W.2d 314 (2001). The trial court's valuation of a closely held corporation is reasonable if it has an acceptable basis in fact and principle. *Keim v. Keim*, 228 Neb. 684, 424 N.W.2d 112 (1988).

At trial, Bradley testified that he had received an offer to purchase the assets of Hruska-Schuman. He also testified that he could not "honestly say" whether he intended to sell the business. Bradley later testified that his decision whether to remain in business or sell would depend on his financial position after the divorce.

The district court commented that it agreed with Natalie that there was no evidence that the business was going to be sold in the near future. Nevertheless, the court considered the tax

consequences of such sale in its valuation of the business. The record does not support a conclusion that the sale of Hruska-Schuman was reasonably certain to occur in the near future or that the court's property division award would require Bradley to sell Hruska-Schuman in order to meet the obligations imposed by the court. We conclude that under the facts of this case, the court abused its discretion in considering the tax consequences of the sale of Hruska-Schuman and reducing the value of the business by such amount.

Natalie next argues that the district court erroneously valued a loan from Bradley to Hruska-Schuman at \$7,259 rather than \$36,166, as was indicated on the income tax returns, and that as a result, Bradley received a double benefit. We conclude that the court erred in assigning a value of \$7,259 to the loan. In the valuation of the business, the loan from Bradley was listed as a liability to the business. Since this liability reduced the value of the business by a comparable amount, the sum of \$36,166 should have been assigned as an asset to Bradley rather than the \$7,259. Therefore, the property assigned to Bradley was undervalued by \$28,907.

We next consider Natalie's claim that the district court erred in determining the value of the real estate on which Hruska-Schuman is located. Both parties presented expert testimony concerning the value of the real estate. Hassebrook opined the market value of the real estate to be \$160,000, and Kubert opined the market value of the real estate to be \$225,000. Natalie asserts that Kubert's appraisal more accurately reflects the best use of the real estate owned by Hruska-Schuman. The court found Hassebrook's value of the real estate to be more persuasive than Kubert's for the reason that Kubert did not use comparable land sales that are accepted by the Uniform Standards of Professional Appraisal Practice. The court also found that Kubert had used many adjustments to his comparables to arrive at his values when there were available comparables that needed no adjustments. The court further reasoned that Kubert's appraisal was more than \$100,000 over the current tax value of the real estate as calculated in the most recent countywide assessment. Our *de novo* review of the record indicates that the district court did not abuse its discretion in its valuation of the property.

Having determined that the district court abused its discretion in considering the tax consequences of the sale of Hruska-Schuman and that the court did not abuse its discretion in finding Hassebrook's valuation more persuasive, we conclude that the business should have been valued at \$243,000.

We next consider whether the \$35,000 downpayment that Bradley allegedly used to purchase the business prior to the marriage was nonmarital property and should be deducted as a nonmarital asset. Bradley claims that he paid \$35,000 toward the purchase of the business in March 1982 and that the parties were not married until September 1984. Natalie argues that the \$35,000 used to purchase the business should be considered a part of the marital estate because at one time during the marriage, the business had no value at all.

[7] The burden of proof to show that property is a nonmarital asset remains with the person making the claim. *Harris v. Harris*, 261 Neb. 75, 621 N.W.2d 491 (2001). We conclude that Bradley has met his burden of demonstrating that the \$35,000 represented a premarital contribution to the business and that, therefore, the district court did not err in determining that this amount should be deducted from the value of the business.

In his cross-appeal, Bradley argues that the district court erred in failing to award him the Saunders County acreage or, in the alternative, that the court erred in failing to set off as separate property the payments made toward the acreage from Bradley's inheritance. We conclude the district court did not abuse its discretion by awarding the Saunders County acreage to Natalie.

Bradley argues in the alternative that the \$53,000 he inherited from his mother should be awarded to him as nonmarital property because the proceeds from the inheritance can be traced to the purchase of the Saunders County acreage. The district court found that any inheritance Bradley may have used to purchase the acreage was marital property because the acreage was placed in joint tenancy with Natalie. Relying on *Gerard-Ley v. Ley*, 5 Neb. App. 229, 558 N.W.2d 63 (1996), Natalie argues that when the acreage was placed in joint tenancy, it became marital property regardless of whether proceeds from Bradley's inheritance were used to purchase the acreage.

The question in *Gerard-Ley* was whether a residence held in joint tenancy by a husband and wife was part of the marital estate for purposes of property division in a dissolution of marriage. During the marriage, the husband obtained just under \$1,750,000 in proceeds from the sale of bank stock he received from his parents through inheritance and gifts. He used \$140,000 of the proceeds to pay the balance due on the residence. In analyzing whether the proceeds paid toward the residence were to be set off as nonmarital property, the Court of Appeals concluded:

[B]ecause [the husband] took title to the property along with [his wife] as joint tenants, it is appropriate to presume that he intended to make a gift to [his wife] of a one-half interest in the property. Recognizing that this presumption is rebuttable, we find no testimony or evidence in the record to rebut the presumption. . . . The district court did not abuse its discretion in including the [parties'] property in the marital estate.

Id. at 237, 558 N.W.2d at 68. In arriving at its conclusion, the Court of Appeals adopted the following principle:

The Nebraska Supreme Court has held that “when a husband and wife take title to a property as joint tenants, even though one pays all the consideration therefor, a gift is presumed to be made by the spouse furnishing the consideration to the other” *Brown v. Borland*, 230 Neb. 391, 395, 432 N.W.2d 13, 17 (1988). See, also, *Marco v. Marco*, 196 Neb. 313, 242 N.W.2d 867 (1976); *Hein v. W. T. Rawleigh Co.*, 167 Neb. 176, 92 N.W.2d 185 (1958); *Peterson v. Massey*, 155 Neb. 829, 53 N.W.2d 912 (1952). This presumption is a rebuttable presumption. *Brown v. Borland*, *supra*; *Marco v. Marco*, *supra*.

Gerard-Ley, 5 Neb. App. at 235, 558 N.W.2d at 67.

[8] The Court of Appeals erred in applying the aforementioned principle in *Gerard-Ley*. None of the cases cited in the quote above involved a dispute between spouses over property distribution following a dissolution of marriage. The manner in which property is titled or transferred by the parties during the marriage does not restrict the trial court’s determination of how the property will be divided in an action for dissolution of marriage. As a general rule, all property accumulated and acquired

by either spouse during the marriage is part of the marital estate, unless it falls within an exception to the general rule. *Heald v. Heald*, 259 Neb. 604, 611 N.W.2d 598 (2000). To the extent that the Court of Appeals' opinion in *Gerard-Ley* can be interpreted to mean that nonmarital property which during a marriage is titled in joint tenancy cannot be considered as a nonmarital asset in an action for dissolution of marriage, such interpretation is expressly disapproved.

[9] How property inherited by a party before or during the marriage will be considered in determining the division of property or an award of alimony must depend upon the facts of the particular case and the equities involved. *Tyma v. Tyma*, 263 Neb. 873, 644 N.W.2d 139 (2002). If the inheritance can be identified, it is to be set off to the inheriting spouse and eliminated from the marital estate. *Id.*

Bradley testified that he made a \$20,000 downpayment on the Saunders County acreage. Natalie testified that the downpayment funds came from an account which contained a portion of Bradley's inheritance from his mother. Natalie testified that the account was jointly held by the parties and that there were other deposits to and withdrawals from the account from other sources. Bradley also testified that he made a loan to Hruska-Schuman from some of the same inheritance. Hruska-Schuman eventually paid back the loan, and Bradley testified he used those funds to pay the balance due on the acreage. However, Bradley did not testify as to the amount of the inheritance he loaned to his business and subsequently used to pay the balance due on the acreage.

The record supports a conclusion that \$19,000 of Bradley's inheritance was eventually used to purchase the Saunders County acreage. The parties purchased the land for approximately \$60,000. Approximately \$20,000 of Bradley's inheritance was deposited into the joint savings account. The downpayment was a certified check of approximately \$19,000, and the money for the check came from this joint account. We conclude that the district court erred in not setting aside \$19,000 from the Saunders County acreage as a part of Bradley's inheritance.

We now proceed to divide the property between Natalie and Bradley. Because appeals in domestic relations matters are

heard de novo on the record, an appellate court is empowered to enter the order which should have been made as reflected by the record. See *Bowers v. Lens*, 264 Neb. 465, 648 N.W.2d 294 (2002). The value of the assets received by Bradley should be increased to reflect the value of Hruska-Schuman at \$243,000 and the value of his loan to the business at \$36,166. The \$35,000 used to purchase the business was a nonmarital asset, and the district court correctly deducted that amount from the value of the business.

In addition, \$19,000 of the value of the Saunders County property should be assigned to Bradley as nonmarital property. The net result is that Bradley received property valued at approximately \$241,000 and Natalie received property valued at \$146,500. The difference in such distribution of property is \$94,500. Bradley is therefore ordered to pay one-half of this amount (\$47,250) in 10 equal annual installments of \$4,725. The first payment shall be due 1 year from the date the mandate of this court is spread on the records of the district court. The subsequent annual payments shall be due each year thereafter until the balance is paid in full. The judgment amount shall accrue interest at the legal rate for judgments from the date the mandate is spread on the records of the district court until said judgment is paid in full.

CONCLUSION

We affirm in part, and in part reverse, and remand with directions that the district court is to divide the marital estate in accordance with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED
AND REMANDED WITH DIRECTIONS.

WHIPPS LAND & CATTLE COMPANY, INC., A NEBRASKA
CORPORATION, AND LYNDELL W. WHIPPS AND
DORIS WHIPPS, HUSBAND AND WIFE, APPELLANTS, V.
LEVEL 3 COMMUNICATIONS, LLC, A DELAWARE
LIMITED LIABILITY COMPANY, APPELLEE.
658 N.W.2d 258

Filed March 14, 2003. No. S-01-1206.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **Statutes: Judgments: Appeal and Error.** Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
3. **Actions: States: Civil Rights: Appeal and Error.** In a federal civil rights action, whether the plaintiff has shown state action is a mixed question of law and fact that is reviewed de novo by an appellate court.
4. **Appeal and Error.** In a de novo review, an appellate court reaches a conclusion independent of the trial court.
5. **Injunction: Equity.** An action for injunction sounds in equity.
6. **Equity: Appeal and Error.** In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court.
7. **Statutes.** A court may, in order to ascertain the proper meaning of a statute, refer to later as well as earlier legislation upon the same subject.
8. _____. In interpreting statutes, all existing acts should be considered, and a subsequent statute may often aid in the interpretation of a prior one.
9. **Federal Acts: Railroads: Right-of-Way.** The federal statute, 43 U.S.C. § 912 (2000), applies to rights-of-way created pursuant to the General Railroad Right of Way Act of 1875, 43 U.S.C. § 934 et seq. (2000), and the United States retains all reversionary interests in such rights-of-way until the United States disposes of those interests as provided by law.
10. **Summary Judgment.** Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
11. **Constitutional Law: Property: Appeal and Error.** An appellate court analyzes the state constitutional issue whether there has been an unconstitutional taking by treating federal constitutional case law and Nebraska state constitutional case law as coterminous.
12. **Constitutional Law: States.** When the claim of a constitutional deprivation is directed against a private party, a two-part inquiry is required. The first question is whether the claimed deprivation has resulted from the exercise of a right of privilege

having its source in state authority. The second question is whether, under the facts of the case, a defendant who is a private party may be appropriately characterized as a “state actor.”

13. ____: _____. The inquiry when the claim of a constitutional deprivation is directed against a private party must be whether there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself. The required nexus may be present if the private entity has exercised powers that are traditionally the exclusive prerogative of the state.
14. **Invasion of Privacy: Words and Phrases.** An invasion of privacy pursuant to Neb. Rev. Stat. § 20-203 (Reissue 1997) is one consisting solely of an intentional interference with the plaintiff’s interest in solitude or seclusion, either as to his or her person or private affairs or concerns, of a kind that would be highly offensive to a reasonable person.
15. **Trespass: Invasion of Privacy.** Trespassing onto real property, without more, is not the form or magnitude of interference into a person’s solitude or seclusion that would rise to the level of being highly offensive to a reasonable person, such as might be actionable under Neb. Rev. Stat. § 20-203 (Reissue 1997).
16. **Injunction: Property: Trespass.** Where the nature and frequency of trespasses are such as to prevent or threaten the substantial enjoyment of the rights of possession and property in land, an injunction will be granted.
17. ____: ____: _____. Concerning simple acts of trespass, equity has, in most cases, no jurisdiction, but if the nature and frequency of trespasses are such as to prevent or threaten the substantial enjoyment of the rights of possession and property in land, an injunction will be granted.

Appeal from the District Court for Dundy County: JOHN J. BATTERSHELL, Judge. Affirmed.

Stephen D. Mossman, of Mattson, Ricketts, Davies, Stewart & Calkins, for appellants.

Danene J. Tushar and Daniel J. Guinan, of Fraser, Stryker, Meusey, Olson, Boyer & Bloch, P.C., for appellee.

HENDRY, C.J., WRIGHT, GERRARD, and MILLER-LERMAN, JJ., and IRWIN, Chief Judge.

GERRARD, J.

NATURE OF CASE

Whipps Land & Cattle Company, Inc., and Lyndell W. Whipps and Doris Whipps (collectively Whipps) sued Level 3 Communications, LLC (Level 3), after Level 3 installed underground fiber-optic cable in railroad rights-of-way that abut

Whipps' properties in Hitchcock and Dundy Counties. The primary issue presented in this appeal is whether the district court correctly concluded that Whipps had no interest in the Hitchcock County right-of-way.

FACTUAL BACKGROUND

Although all of the issues presented in this case stem from Level 3's installation of underground fiber-optic cable, the issues differ significantly with respect to the Hitchcock County and Dundy County properties, because of the chain of title of the properties and the railroad rights-of-way.

In 1882, the federal government, pursuant to the General Railroad Right of Way Act of 1875, granted the Republican Valley Railroad Company a right-of-way over the Hitchcock County property, which then still belonged to the federal government. The Hitchcock County property was subsequently granted by patent deed to Alpheus Talkington. The property was eventually conveyed to Frank and Vera Whipps, who in turn conveyed the property by warranty deed to the Whipps Land & Cattle Company, Inc., in 1975. The right-of-way is now held by the Republican Valley Railroad Company's successor, the Burlington Northern and Santa Fe Railway Company (BNSF). The Hitchcock County right-of-way is 200 feet wide.

The Dundy County right-of-way was granted by deed to the Republican Valley Railroad Company in 1881 by Charles Hickman, Whipps' predecessor in title to the Dundy County property. This right-of-way is also now held by BNSF. The right-of-way deed created a right-of-way that is 100 feet wide.

Level 3 entered into an agreement with BNSF granting Level 3 right-of-way access to construct a fiber-optic network along BNSF's rights-of-way. Level 3 installed underground fiber-optic cable within the Hitchcock County right-of-way in 1999. The cable installation occurred on the northern side of the right-of-way, about 90 feet from the railroad tracks, which generally follow the centerline.

Due to an error in Level 3's construction plans, the installation of the cable continued to be 90 feet from the centerline in Dundy County—placing the cable approximately 40 feet outside the right-of-way and on Whipps' Dundy County property. When the

discrepancy was discovered, construction was halted and the 2,000 feet of installed cable on the Dundy County property was abandoned. Level 3 completed its construction by rerouting cable installation inside the right-of-way.

Whipps sued for trespass, intentional invasion of privacy, and unconstitutional taking. Whipps sought damages, injunctive relief, and attorney fees pursuant to 42 U.S.C. §§ 1983 (2000) and 1988 (Supp. IV 1998). The district court granted partial summary judgment against Whipps with respect to activities inside the railroad rights-of-way in both Hitchcock and Dundy Counties, concluding that BNSF's rights-of-way were sufficient for BNSF to permit Level 3's cable installation. The district court concluded that BNSF held all title to the Dundy County right-of-way and that Whipps had no interest in the property subject to the Hitchcock County right-of-way.

The matter proceeded to trial regarding Level 3's admitted incursion 40 feet outside the Dundy County right-of-way. The district court rejected Whipps' constitutional claim, finding that Level 3's actions were not a taking, did not involve state action, and were unintentional. The district court found that Level 3's actions were not an intentional invasion of privacy, but simply a trespass. The district court awarded damages for trespass on the Dundy County property in the amount of \$3,500. No injunctive relief was granted.

ASSIGNMENTS OF ERROR

Whipps assigns, restated and consolidated, that the district court erred in (1) granting partial summary judgment with respect to Whipps' claims regarding Level 3's installation of cable inside the Hitchcock County right-of-way, (2) refusing to award damages for the unconstitutional taking of the Dundy County property, (3) failing to award attorney fees under §§ 1983 and 1988, (4) failing to find and award damages for an intentional invasion of privacy, and (5) refusing to grant injunctive relief to prevent future trespasses by Level 3.

It should be noted that Whipps does not make any appellate argument with respect to Level 3's installation of cable inside the Dundy County right-of-way. Thus, the issues are generally confined to (1) Whipps' interest, if any, to property *inside* the

Hitchcock County right-of-way and (2) Whipps' claims and damages resulting from Level 3's incursion *outside* the Dundy County right-of-way.

STANDARD OF REVIEW

[1] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Egan v. Stoler*, ante p. 1, 653 N.W.2d 855 (2002).

[2] Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Id.*

[3,4] In a federal civil rights action, whether the plaintiff has shown state action is a mixed question of law and fact that is reviewed de novo by an appellate court. See, *Puerto Rico Tele. v. Telecommunications Reg. Bd.*, 189 F.3d 1 (1st Cir. 1999); *Duke v. Smith*, 13 F.3d 388 (11th Cir. 1994); *Merritt v. Mackey*, 932 F.2d 1317 (9th Cir. 1991). In a de novo review, an appellate court reaches a conclusion independent of the trial court. *Tipp-It, Inc. v. Conboy*, 257 Neb. 219, 596 N.W.2d 304 (1999).

[5,6] An action for injunction sounds in equity. In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court. See *Reichert v. Rubloff Hammond, L.L.C.*, 264 Neb. 16, 645 N.W.2d 519 (2002).

ANALYSIS

HITCHCOCK COUNTY RIGHT-OF-WAY

We first address Whipps' claims regarding the property inside the Hitchcock County right-of-way. We begin this analysis on the most fundamental level: What, if any, interest does Whipps have in the property inside the right-of-way? Answering this question requires two separate determinations. We must first determine the scope of the railroad right-of-way—what it included and what interest remained in the grantor, the United States. Second, we must determine whether any interest that remained in the United States still remains with the United States or if that interest was

subsequently transferred by the United States to Whipps' predecessor in title.

The scope of BNSF's right-of-way is a matter of federal law. It is important to understand, at the outset, that while the vocabulary of the common law of real property is often imported into the discussion of railroad rights-of-way, where those rights-of-way have been created by federal law, they are entirely creatures of federal statute, and their scope and duration are determined, not by common-law principles, but by the relevant statutory provisions. See, *Brown v. State*, 130 Wash. 2d 430, 924 P.2d 908 (1996); *Puett v. Western Pacific Railroad*, 104 Nev. 17, 752 P.2d 213 (1988).

The Hitchcock County right-of-way was created by virtue of the General Railroad Right of Way Act of 1875 (hereinafter 1875 Act), 43 U.S.C. § 934 et seq. (2000). In *State of Idaho v. Oregon Short Line R. Co.*, 617 F. Supp. 207 (D. Idaho 1985), the court discussed the history of the 1875 Act.

From 1850 to 1871, Congress subsidized railroad construction through large grants of public lands. *Great Northern Railroad Co. v. United States*, 315 U.S. 262, 263, 62 S.Ct. 529, 533, 86 L.Ed. 836 (1942). In 1871, Congress, with a finger to the prevailing winds of public opinion, changed this policy and discontinued outright grants of land to railroads. *Id.* Congress, however, still intended railroads to have exclusive use and possession of railroad rights-of-way. This may be inferred from the continued use of the term "right-of-way" in the 1875 Act and from the fact that railroads must have exclusive use of their rights-of-way in order to function. The term "right-of-way," in the context of railroad property interests, is a term of art signifying an interest in land which entitles the railroad to the exclusive use and occupancy in such land. . . . Because exclusive use and occupancy are not rights comprised within the traditional definition of an easement, definitional problems later arose in describing the nature of the railroad's interest in its right-of-way.

Oregon Short Line R. Co., 617 F. Supp. at 210.

From 1871 to 1875, Congress dealt with railroad rights-of-way on an individualized basis. *Id.* Congress then passed the 1875 Act, which provided, in relevant part, that "[t]he right of way through

the public lands of the United States is granted to any railroad company duly organized under the laws of any State or Territory . . . to the extent of one hundred feet on each side of the central line of said road.” See § 934. The operative language of the 1875 Act was virtually identical to that of most or all of the pre-1871 acts. *Oregon Short Line R. Co.*, *supra*.

It is clear that the 1875 Act was not intended to grant a fee interest to railroads. *Oregon Short Line R. Co.*, *supra*. The nature of the interest conveyed, however, was subject to some confusion. The result of early U.S. Supreme Court decisions was a concept of “‘limited fee with an implied condition of reverter.’” *Oregon Short Line R. Co.*, 617 F. Supp. at 210, citing *Northern Pacific Ry. v. Townsend*, 190 U.S. 267, 23 S. Ct. 671, 47 L. Ed. 1044 (1903). The concept of a “limited fee” was probably applied because under the common law of real property, an easement was an incorporeal hereditament which did not give an exclusive right of possession. See *State of Wyoming v. Udall*, 379 F.2d 635 (10th Cir. 1967). As the meaning of the term “easement” expanded, in the context of railroads, to include the right in perpetuity to exclusive use and possession of the land, the “limited fee” concept disappeared. See *id.* By 1942, the U.S. Supreme Court modified its understanding of rights-of-way under the 1875 Act and held that the rights-of-way were only easements and not fee interests. See *Great Northern Ry. Co. v. U. S.*, 315 U.S. 262, 62 S. Ct. 529, 86 L. Ed. 836 (1942).

Given the foregoing, the *Oregon Short Line R. Co.* court reached the following conclusions:

Congress, in granting the 1875 Act rights-of-way, did not intend to convey to the railroads a fee interest in the underlying lands. Congress did, however, intend to give the railroads an interest suitable for railroad purposes—a right-of-way, which, by definition, carried with it the right to exclusive use and occupancy of the land.

617 F. Supp. at 212. See, also, *Simacek v. York County Rural P.P. Dist.*, 220 Neb. 484, 370 N.W.2d 709 (1985). Applied to the instant case, we similarly conclude that BNSF’s right-of-way, when created, was an easement as explained above, with a reversionary interest in the United States should the right-of-way cease to be used for railroad purposes.

Having concluded that the United States retained an interest in the property subject to the right-of-way, we must now determine what happened to that interest when the United States conveyed the Hitchcock County property to Whipps' predecessors in title. Courts are divided on that question. However, the prevailing view is that the underlying interest in active rights-of-way is held by the United States, and not by the adjacent landowner.

Pertinent to this determination is the specific provision made by the U.S. Congress for abandoned railroad rights-of-way. In 1922, Congress enacted 43 U.S.C. § 912 (2000), which provides in relevant part that when a railroad right-of-way is abandoned, "all right, title, interest, and estate of the United States in said lands shall . . . be transferred to and vested in any person, firm, or corporation, assigns, or successors in title and interest to whom or to which title of the United States may have been or may be granted."

Excepted, however, are any lands on which a public highway is established within 1 year of the abandonment of the right-of-way and the mineral rights in the land, which are reserved in the United States. See *id.* Furthermore, if the right-of-way runs through a municipality, the municipality acquires the federal interest, regardless of whether it has title to the adjacent fee. See, *id.*; *Buckley v. Burlington Northern*, 106 Wash. 2d 581, 723 P.2d 434 (1986).

Of the few courts to have directly considered disposition of reversionary interests created under the 1875 Act, most have determined that § 912 applies to rights-of-way created pursuant to the 1875 Act. See, *Marshall v. Chicago and Northwestern Transp. Co.*, 31 F.3d 1028 (10th Cir. 1994); *Vieux v. East Bay Regional Park Dist.*, 906 F.2d 1330 (9th Cir. 1990); *State of Idaho v. Oregon Short Line R. Co.*, 617 F. Supp. 207 (D. Idaho 1985); *Barney v. Burlington Northern R. Co.*, 490 N.W.2d 726 (S.D. 1992). But see *City of Aberdeen v. Chicago & North Transp.*, 602 F. Supp. 589 (D.S.D. 1984).

"This Court has the obligation to interpret § 912 . . . in such a way to fully effectuate congressional intent: These statutes would be rendered null if this Court were to find them inapplicable to 1875 Act rights-of-way, for they were specifically enacted to dispose of the United States' retained

interest in 1875 Act rights-of-way. *See* [H.R. Rep. No. 217, 67th Cong., 1st Sess. 1 (1921); H.R. Rep. No. 843, 66th Cong., 2d Sess. 2 (1920)]. In enacting these statutes, Congress clearly felt that it had some retained interest in railroad rights-of-way. The precise nature of that retained interest need not be shoe-horned into any specific category cognizable under the rules of real property law. . . . [C]ongressional committeemen in the early 1920's spoke of this retained interest in terms of an 'implied condition of reverter.' Regardless of the precise nature of this interest, Congress clearly believed that it had authority over 1875 Act railroad rights-of-way. [Section 912] evince[s] an intent to ensure that railroad rights-of-way would continue to be used for public transportation purposes, primarily for highway transportation. . . .

In conclusion, the Court finds that [§ 912] appl[ies] to 1875 Act rights-of-way."

Marshall, 31 F.3d at 1032, quoting *Oregon Short Line R. Co.*, *supra*. Accord *Barney*, *supra*.

Even if the 1875 Act granted only an easement, as opposed to a higher right-of-way interest, Congress had authority, by virtue of its broad power over interstate commerce, to grant such easements subject to its own terms and conditions—which were to preserve a corridor of public transportation, particularly the railroad transportation, in order to facilitate the development of the "Western vastness." Congress could pre-empt or override common-law rules regarding easements, reversions, or other traditional real property interests. In other words, even if the 1875 Act granted only an easement, it does not necessarily follow that Congress would or did not intend to retain an interest in that easement. This is consistent with another well-settled rule of statutory construction which provides that conveyances by the Government will be strictly interpreted against the grantee and in favor of the grantor.

Oregon Short Line R. Co., 617 F. Supp. at 212.

Simply put, the above-cited courts have concluded that if the United States' retained interest in a railroad right-of-way was

conveyed to the United States' successor in title along with the adjacent fee, then Congress would not have needed to enact § 912 to transfer that interest upon abandonment of the right-of-way. Furthermore, § 912 could not, as it purports, transfer that interest to anyone other than the adjacent feeholder, such as states or municipalities, nor could the United States reserve the mineral estate to itself.

[7,8] A court may, in order to ascertain the proper meaning of a statute, refer to later as well as earlier legislation upon the same subject. See *Wagoner v. Central Platte Nat. Resources Dist.*, 247 Neb. 233, 526 N.W.2d 422 (1995). All existing acts should be considered, and a subsequent statute may often aid in the interpretation of a prior one. *Id.* Based upon that principle of statutory construction, courts have relied upon § 912 to support the conclusion that pursuant to federal statute, rights-of-way created pursuant to the 1875 Act reserved reversionary interests in the United States that have not been subsequently conveyed as part of the adjacent fee. See, *Marshall v. Chicago and Northwestern Transp. Co.*, 31 F.3d 1028 (10th Cir. 1994); *Vieux v. East Bay Regional Park Dist.*, 906 F.2d 1330 (9th Cir. 1990); *State of Idaho v. Oregon Short Line R. Co.*, 617 F. Supp. 207 (D. Idaho 1985); *Barney v. Burlington Northern R. Co.*, 490 N.W.2d 726 (S.D. 1992).

[9] On matters of federal law, the decisions of federal courts are highly persuasive, particularly where federal legislative history and the interpretation of federal statutes are at issue. We are persuaded by the reasoning of the 9th and 10th Circuits, set forth above, and likewise conclude that § 912 applies to rights-of-way created pursuant to the 1875 Act and that the import of § 912 is that the United States retains all reversionary interests in such rights-of-way until the United States disposes of those interests as provided by law.

Returning to the circumstances of the instant case, we note that there is no suggestion, or support in the record, for a finding that the Hitchcock County right-of-way has been abandoned within the meaning of § 912. In fact, the record indicates that the railroad is still operating in the right-of-way. Therefore, we conclude that any reversionary interest in the Hitchcock County right-of-way is still possessed by the United States. Obviously,

if Whipps has no interest in the land inside the right-of-way, then Whipps has no claim for relief with respect to any incursion onto that land.

[10] Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Soukop v. ConAgra, Inc.*, 264 Neb. 1015, 653 N.W.2d 655 (2002). In this case, there was no genuine issue of material fact, and Level 3 was entitled to judgment as a matter of law regarding the Hitchcock County right-of-way because Whipps had no rights in that property. On that basis, we reject Whipps' first assignment of error and affirm the district court's entry of summary judgment against Whipps with respect to property inside the Hitchcock County right-of-way.

UNCONSTITUTIONAL TAKING

[11] Whipps' second and third assignments of error relate to its claim that it is entitled to damages and attorney fees under §§ 1983 and 1988 for the unconstitutional taking, without compensation, of its property outside the Dundy County right-of-way. Although Whipps argues that its property was taken in violation of both the U.S. and Nebraska Constitutions, this court has analyzed the state constitutional issue whether there has been an unconstitutional taking by treating federal constitutional case law and our state constitutional case law as coterminous. See *Strom v. City of Oakland*, 255 Neb. 210, 583 N.W.2d 311 (1998). Section 1983 provides, as relevant:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

Section 1988 provides, as relevant, that prevailing parties in § 1983 actions may be entitled to attorney fees. The threshold

issue, however, is whether Level 3 engaged in “state action,” i.e., acted under color of state law, when it trespassed onto Whipps’ Dundy County property.

Careful adherence to the “state action” requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. It also avoids imposing on the state, its agencies, or officials responsibility for conduct for which they cannot fairly be blamed. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982).

Our cases have accordingly insisted that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State. These cases reflect a two-part approach to this question of “fair attribution.” First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State. Without a limit such as this, private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them.

Lugar, 457 U.S. at 937.

[12] In a case such as this, when the claim of a constitutional deprivation is directed against a private party, a two-part inquiry is required. The first question is whether the claimed deprivation has resulted from the exercise of a right of privilege having its source in state authority. The second question is whether, under the facts of the case, a defendant who is a private party may be appropriately characterized as a “state actor.” See *id.* Whipps’ argument fails on the first point.

The sole basis identified by Whipps for attribution of Level 3’s actions to the state is that Level 3, as a telecommunications company, is authorized by statute to enter upon private lands for surveying, with the power of eminent domain. See Neb. Rev. Stat. § 86-701 et seq. (Cum. Supp. 2002). The failure in Whipps’

argument is that even if Level 3 has been imbued with such power by the state, that power was not exercised in this instance, and none of the damages claimed by Whipps were incurred as a result of any power given by the state to Level 3. Whipps' argument "'overlooks the essential point—that the state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff but with the activity that caused the injury.'" See *Lucas v. Wisconsin Electric Power Company*, 466 F.2d 638, 657 n.47 (7th Cir. 1972) (en banc), quoting *Powe v. Miles*, 407 F.2d 73 (2d Cir. 1968).

In *Lucas*, the plaintiff brought a class action, in part, against an electric power company, challenging an administrative policy which permitted discontinuation of service for nonpayment of charges. The plaintiff argued, inter alia, that the actions of the utility were a "state action" because the state authorized the utility to enter private property under certain circumstances. 466 F.2d at 645. The Seventh Circuit rejected the plaintiff's argument, noting that "[i]f that authority were invoked by the defendants in this case, an entirely different issue would be presented. On the record before us, however, it appears that the termination of plaintiff's service can be completed simply by throwing the proper switch or disconnecting the proper wires." *Id.* at 656. The court concluded that the utility's private actions were, therefore, not under color of state law within the meaning of § 1983. *Lucas, supra*. See, also, *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 95 S. Ct. 449, 42 L. Ed. 2d 477 (1974).

Whipps relies on *Ballard Fish & Oyster Co. v. Glaser Construction Co.*, 424 F.2d 473 (4th Cir. 1970), in which the Fourth Circuit found that a natural gas company had acted under color of state law in the construction of a gas pipeline across the plaintiff's oyster beds, even though the gas company had failed to obtain an easement as provided by law. *Ballard Fish & Oyster Co.*, however, is inapposite to the case at bar. The determinative factor in that case was the court's finding that the gas company intentionally took the plaintiff's property "through misuse of the power the state granted it to acquire easements." *Id.* at 474-75. No such intentional misuse of state power is present in the instant case—Level 3 obtained permission from BNSF to use its

rights-of-way in a private transaction and only mistakenly entered onto Whipps' property. In any event, the reasoning of *Ballard Fish & Oyster Co.*, *supra*, appears strained in light of subsequent U.S. Supreme Court decisions. See, e.g., *Blum v. Yaretsky*, 457 U.S. 991, 102 S. Ct. 2777, 73 L. Ed. 2d 534 (1982); *Jackson v. Metropolitan Edison Co.*, *supra* (fact that business is subject to state regulation does not convert action into that of state).

[13] The inquiry in such cases must be whether “‘there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.’” *Blum*, 457 U.S. at 1004, quoting *Jackson*, *supra*. The required nexus may be present if the private entity has exercised powers that are traditionally the exclusive prerogative of the state. *Id.* But in this case, Whipps concedes that Level 3 did not exercise, or seek to exercise, any power granted to it by state law to enter private property or exercise eminent domain. The inadvertent entry onto the Dundy County property cannot be ascribed to any governmental decision, and Whipps' claimed deprivation has not resulted from the exercise of a right or privilege having its source in state authority. See *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982). The district court correctly concluded that Whipps did not satisfy the “state action” requirement of § 1983 and that Whipps was not entitled to relief under § 1983 or § 1988. Whipps' second and third assignments of error are without merit.

INVASION OF PRIVACY

[14] Whipps claims that the district court should have awarded damages for an intentional invasion of privacy pursuant to Neb. Rev. Stat. § 20-203 (Reissue 1997). We recently discussed the scope of § 20-203 in *Polinski v. Sky Harbor Air Serv.*, 263 Neb. 406, 412, 640 N.W.2d 391, 396 (2002):

Section 20-203 provides as follows: “Any person, firm, or corporation that trespasses or intrudes upon any natural person in his or her place of solitude or seclusion, if the intrusion would be highly offensive to a reasonable person, shall be liable for invasion of privacy.” In *Kaiser v. Western*

R/C Flyers, 239 Neb. 624, 477 N.W.2d 557 (1991), we considered the nature of an intrusion under § 20-203. In *Kaiser*, we described the invasion of privacy as one “‘consist[ing] solely of an intentional interference with [the plaintiff’s] interest in solitude or seclusion, either as to his person or as to his private affairs or concerns, of a kind that would be highly offensive to a reasonable man.’” 239 Neb. at 631, 477 N.W.2d at 562 (quoting Restatement (Second) of Torts § 652 B, comment *a.* (1977)). We listed the following examples from the Restatement as illustrations of the types of intrusions for consideration as an invasion of privacy under § 20-203: “a reporter’s entering a hospital room and taking the photograph of a person suffering from a rare disease; ‘window peeking’ or wiretapping by a private detective; obtaining access to a person’s bank records pursuant to a forged court order; or the continuance of frequent telephone solicitations.” *Kaiser*, 239 Neb. at 631, 477 N.W.2d at 562.

Accord *Wilkinson v. Methodist, Richard Young Hosp.*, 259 Neb. 745, 612 N.W.2d 213 (2000). Compare *Sabrina W. v. Willman*, 4 Neb. App. 149, 540 N.W.2d 364 (1995) (photographing woman in tanning booth without her consent fell within scope of statute).

In *Kaiser v. Western R/C Flyers*, 239 Neb. 624, 477 N.W.2d 557 (1991), the defendants operated a model airplane field. The plaintiffs, who owned land adjacent to the field, complained that the model airplanes were noisy and continually trespassed over the plaintiffs’ land. This court rejected the plaintiffs’ claims under § 20-203, concluding that § 20-203 was not “designed to protect persons from the type of alleged intrusion involved in this case.” *Kaiser*, 239 Neb. at 631, 477 N.W.2d at 562.

[15] Although the intrusions in the instant case are more substantial than those alleged in *Kaiser*, *supra*, the same distinction is present between a mere trespass and the intrusion into “‘private affairs or concerns,’”” *id.* at 631, 477 N.W.2d at 562, at which § 20-203 is directed. While Level 3’s entrance onto Whipps’ property was intrusive and the Whipps had every right to be upset about the resulting disturbance, the circumstances of Level 3’s incursion presented a classic case of common-law trespass, for which damages were awarded. Trespassing onto real property,

without more, is simply not the form or magnitude of interference into a person's solitude or seclusion that would rise to the level of being highly offensive to a reasonable person, such as might be actionable under § 20-203. See, *Polinski, supra*; *Wilkinson, supra*; *Kaiser, supra*. The district court correctly rejected Whipps' theory of recovery based on § 20-203. Whipps' assignment of error to the contrary is without merit.

INJUNCTIVE RELIEF

[16,17] Whipps' final argument is that the district court should have entered injunctive relief against further trespassing by Level 3.

This court stated in *Sillasen v. Winterer*, 76 Neb. 52, 54, 107 N.W. 124, 125 (1906), that "the rule is firmly established in this state and elsewhere that, where the nature and frequency of trespasses are such as to prevent or threaten the substantial enjoyment of the rights of possession and property in land, an injunction will be granted." We also stated in *Thomas v. Weller*, 204 Neb. 298, 304, 281 N.W.2d 790, 793 (1979), that "[c]oncerning simple acts of trespass, equity has, in most cases, no jurisdiction, but if the nature and frequency of trespasses are such as to prevent or threaten the substantial enjoyment of the rights of possession and property in land, an injunction will be granted." *Harders v. Odvody*, 261 Neb. 887, 896, 626 N.W.2d 568, 575 (2001). The record in this case indicates that Level 3's trespasses onto the Dundy County property were inadvertent and ceased as soon as Level 3 became aware of its mistake. The record provides no basis for concluding that Level 3 will engage in any future trespassing, much less trespassing of such a "nature and frequency . . . such as to prevent or threaten the substantial enjoyment of the rights of possession and property in land." See *id.* Whipps simply argues that "there is no reason to believe that Level 3 will not engage in similar behavior in the future." Brief for appellants at 35. This assertion is insufficient to warrant the "extraordinary remedy" of injunctive relief. See *Harders*, 261 Neb. at 895, 626 N.W.2d at 575. The district court did not err in failing to enter an injunction, and Whipps' final assignment of error is without merit.

CONCLUSION

For the foregoing reasons, the district court's judgment in the sum of \$3,500 for trespass on the Dundy County property is affirmed.

AFFIRMED.

CONNOLLY, STEPHAN, and MCCORMACK, JJ., not participating.

GERARD T. FORGÉT III, APPELLANT, v. STATE OF NEBRASKA
EX REL. STATE BOARD OF PUBLIC ACCOUNTANCY
OF THE STATE OF NEBRASKA, APPELLEE.

658 N.W.2d 271

Filed March 14, 2003. No. S-01-1397.

1. **Appeal and Error.** In order to be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.
2. _____. Errors argued but not assigned will not be considered on appeal.
3. **Administrative Law: Final Orders: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
4. **Administrative Law: Judgments: Appeal and Error.** When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
5. **Administrative Law: Statutes: Appeal and Error.** To the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
6. **Administrative Law: Appeal and Error.** In an appeal under the Administrative Procedure Act, an appellate court will not substitute its factual findings for those of the district court where competent evidence supports the district court's findings.
7. **Statutes: Legislature: Intent.** When considering a series or collection of statutes pertaining to a certain subject matter which are in pari materia, they may be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions of the act are consistent and sensible.
8. **Statutes: Appeal and Error.** Appellate courts must, as far as practicable, give effect to the language of a statute and reconcile the different provisions of it so they are consistent, harmonious, and sensible.
9. **Accountants: Licenses and Permits: Words and Phrases.** A public accountancy "certificate holder or registrant who has not lost his or her right to issuance or renewal of a permit," who may be classified as inactive pursuant to Neb. Rev. Stat.

§ 1-136(4) (Reissue 1997), is a person who is otherwise entitled to issuance of a permit under the requirements set forth in the Public Accountancy Act.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Affirmed.

Gerard T. Forgét III, pro se.

Robert T. Gritmit, of Baylor, Evnen, Curtiss, Gritmit & Witt, L.L.P., for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

NATURE OF CASE

Gerard T. Forgét III was sanctioned by the Nebraska Board of Public Accountancy (the Board) for holding himself out as a certified public accountant (CPA) without holding an active CPA permit, in violation of the Public Accountancy Act, Neb. Rev. Stat. § 1-105 et seq. (Reissue 1997 & Cum. Supp. 2002). The primary question presented in this appeal is whether an individual who has successfully taken the CPA examination, but has not completed the experience requirement necessary to obtain a CPA permit, may be considered an “inactive” CPA and use the designation “CPA.”

BACKGROUND

Forgét is an Omaha attorney specializing in tax law. Forgét took and passed the Nebraska CPA examination in 1996 and was issued a certificate on December 1, 1997, indicating that he had passed the examination. See § 1-114. Forgét did not, however, submit to the Board any professional experience in order to obtain an active CPA permit. See § 1-136.02.

Forgét was listed in the Board’s records, beginning in January 1998, as an inactive CPA. Forgét renewed his inactive registration on March 5 by submitting an application to the Board. One question on the application asked, “Do you hold yourself out as a CPA in the state of Nebraska?” and reminded the applicant that “[y]ou must have an active permit to do so.” Forgét indicated that he did not hold himself out as a CPA.

However, on August 27, 1998, the Board issued a cease and desist notice to Forgét, in connection with Forgét's placement of a telephone directory listing for Forgét's business, the "Forgét Firm," under the yellow pages category, "Accountants—Certified Public." On August 28, Forgét replied to the cease and desist notice, apologized to the Board for the "misunderstanding," and indicated his intent not to list the advertisement in future telephone directories. On September 24, Forgét was directed to provide the Board with a copy of a certified letter to be sent to the telephone directory publisher to cancel the listing. On November 23, the Board, not having received such verification, scheduled a "Show Cause hearing." Forgét was notified at the hearing that the Board regarded his conduct as contrary to Nebraska law.

On November 3, 1999, the Board filed a formal complaint against Forgét. The complaint alleged that Forgét had maintained a telephone directory listing under the category "Accountants—Certified Public." The complaint also alleged that Forgét maintained an Internet Web page on which Forgét used the designation "CPA." The complaint charged Forgét with violation of the Public Accountancy Act and several Board regulations.

A formal hearing was held before the Board on December 1, 1999. Forgét testified at the hearing that he practiced tax law as an attorney and represented taxpayers in front of and against the Internal Revenue Service in contested cases, but did not create financial statements, render opinions on financial statements, or otherwise have an accounting practice. Although Forgét had prepared income tax returns for businesses and individuals, Forgét had not conducted compilations, reviews, or audits, and did not intend to do so.

Forgét's business card, entered into evidence at the formal hearing, identified him as "Gerard 'Rod' T. Forgét III, J.D., MBA, LL.M., CPA" and "Attorney at Law." The letters "CPA" were marked with an asterisk, and at the bottom of the business card, in smaller type, it was indicated that Forgét was an "inactive member, Nebraska Society of Certified Public Accountants."

The record also contains telephone directory listings for the Forgét Firm, from two different Omaha telephone directories for 1999-2000. One listing was placed in the US West directory,

under the category “Accountants—Certified Public,” and indicates a “CPA Certificate NE Board of Accountancy.” The letters “CPA” are larger and in bolder typeface than the rest of the words on that line. The second listing, placed in the McLeod USA directory under the category “Accountants,” indicates a “CPA Certificate-Nebraska Board Public Accountancy.” The letters “CPA” are in bolder typeface than those on the rest of that line. The Forgét Firm was not listed under the category “Accountants—Certified Public” in the McLeod USA directory, although that category was available. Forgét also had listings in both directories under the category for tax attorneys; neither listing contained a reference to a CPA designation of any kind.

Printouts from Forgét’s Web page indicate that the Web page in question was a business homepage for the Forgét Firm, and Forgét was identified as an “Attorney at Law and CPA.” Forgét testified that once the contents of the Web page were called to his attention by the Board’s formal complaint, he directed the individual who designed Forgét’s Web page to modify the content to identify Forgét as a “CPA Registrant,” and that the change was made on the date Forgét received the formal complaint. Printouts from the Web page, present in the record, reflect this change, and Forgét testified that those printouts reflected the content of his Web page at the time of the formal hearing.

On January 19, 2001, the Board entered a decision and order finding that Forgét had violated the Public Accountancy Act and the Board’s rules and regulations. The Board revoked Forgét’s CPA certificate, but suspended the judgment of revocation pursuant to the conditions that (1) Forgét not associate his name or that of his firm with the terms “‘certified public accountant’” or “‘CPA’” in any manner or form and (2) Forgét would be permitted to refer to his completion of the CPA examination and/or his membership in professional accountant associations only if that reference contained the following statement: “‘I passed the Uniform Certified Public Accountants examination on May 8, 1996 but I have not met all the requirements for a permit to practice public accountancy and therefore I am not a CPA.’”

Forgét appealed to the district court pursuant to the Administrative Procedure Act, Neb. Rev. Stat. § 84-901 et seq. (Reissue 1999). See § 1-149 (decisions of Board may be appealed

in accordance with Administrative Procedure Act). The court affirmed the decision of the Board. Forg t appeals.

ASSIGNMENTS OF ERROR

Forg t assigns that the court erred in (1) finding that Forg t was not an inactive CPA, (2) finding that Forg t held himself out to the public as a CPA permit holder, (3) finding that Forg t misled and deceived the public by his representations in his advertising, and (4) applying   1-117 over   1-122 by giving priority of a general statutory provision over a special provision when the two conflicted.

[1,2] Forg t also argues, in his brief, that the Board's order is arbitrary, capricious, and unreasonable and that the Board has violated Forg t's rights under the First Amendment to the U.S. Constitution. However, these are not assigned as error. In order to be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error. *Nelson v. Lusterstone Surfacing Co.*, 258 Neb. 678, 605 N.W.2d 136 (2000). Errors argued but not assigned will not be considered on appeal. *Harris v. Harris*, 261 Neb. 75, 621 N.W.2d 491 (2001).

STANDARD OF REVIEW

[3,4] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *American Legion v. Nebraska Liquor Control Comm.*, ante p. 112, 655 N.W.2d 38 (2003). When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

[5,6] To the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Id.* In an appeal under the Administrative Procedure Act, an appellate court will not substitute its factual findings for those of the district court

where competent evidence supports the district court's findings. *Kosmicki v. State*, 264 Neb. 887, 652 N.W.2d 883 (2002).

ANALYSIS

Forgét's first assignment of error is that the court erred in finding that Forgét was not an inactive CPA. We begin our analysis of this assignment of error with a general examination of the process of CPA licensing set forth by the Public Accountancy Act. Prior to January 1, 1998, the Board could issue

a certificate of certified public accountant to any person (a) who is a resident of this state or has a place of business therein or, as an employee, is regularly employed therein, (b) who has graduated from a college or university of recognized standing, and (c) who has passed a written examination in accounting, auditing, and such other related subjects as the board determines to be appropriate.

§ 1-114(1). It is not disputed that Forgét met the above qualifications. However, issuance of a certificate is not the same as issuance of a permit to engage in the practice of public accountancy. The Board issues a permit to engage in the practice of public accountancy to a certificate holder only when the certificate holder meets certain experience requirements. See § 1-136(1). Acceptable experience includes, for instance, 2 years of employment by anyone engaging in the practice of public accountancy or experience gained through employment by government agencies. See § 1-136.02. The methods of meeting the statutory experience requirement need not be examined in detail, as it is undisputed that Forgét has not met the experience requirement.

The Public Accountancy Act explicitly provides that "[a]ny person who has successfully completed the examination described in section 1-114 shall have no status as a certified public accountant *unless and until he or she has the requisite experience* and also has been issued a certificate as a certified public accountant." (Emphasis supplied.) § 1-117. However, § 1-136(4) also provides:

Any certificate holder or registrant who has not lost his or her right to issuance or renewal of a permit and who is not actively engaged in the practice of public accountancy in this state may file a written application with the board to be

classified as inactive. A person so classified shall not be issued a permit or be deemed the holder of a permit but shall be carried upon an inactive roll to be maintained by the board upon the payment of an inactive fee A person so classified shall not be deprived of the right to the issuance or renewal of a permit and may, upon application to the board and upon payment of the current permit fee, be issued a current permit.

Any person who is classified as inactive under § 1-136 “shall be styled and known as a certified public accountant and may also use the abbreviation C.P.A.” § 1-122. See, also, § 1-151(1). Forgét argues that he was an inactive CPA pursuant to § 1-136(4) and, thus, entitled to use the abbreviation “C.P.A.” by § 1-122.

[7] However, Forgét’s argument is inconsistent with the language and intent of the Public Accountancy Act. When considering a series or collection of statutes pertaining to a certain subject matter which are in *pari materia*, they may be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions of the act are consistent and sensible. *Foote v. O’Neill Packing*, 262 Neb. 467, 632 N.W.2d 313 (2001). The intent of the Legislature, expressed throughout the Public Accountancy Act, is that a person must have satisfactory experience in order to practice public accountancy in Nebraska. It is similarly evident that the Legislature intended to limit the use of the terms “certified public accountant” and “C.P.A.” to persons who have met all the requirements imposed by the Public Accountancy Act, including the experience requirement. See §§ 1-151 and 1-166 (unauthorized use of terms is Class II misdemeanor).

Considered in *pari materia*, it is apparent that a certificate holder “who has not lost his or her right to issuance . . . of a permit,” within the meaning of § 1-136(4), is a person who has the present right to issuance of a permit, if a permit is requested. This is evidenced by the fact that § 1-136(4) permits an inactive CPA to be issued a current permit upon application to the Board and payment of the current permit fee. This is only sensible if the inactive classification is limited to those who have met the requirements of the Public Accountancy Act for the issuance of an active permit, including the required experience.

Furthermore, § 1-136(3) provides that if a certificate holder fails to apply for a permit within 3 years of the expiration of his or her last permit, or 3 years from the date the certificate was issued, the certificate holder may be deprived of the right to issuance or renewal of a permit. The evident purpose of § 1-136(4) is to permit certificate holders to maintain their right to issuance of a permit by applying for inactive classification and paying reduced fees. Thus, the language of § 1-136(4) is best read as a reference to the provisions of § 1-136(3)—one who “has not lost his or her right to issuance or renewal of a permit” within the meaning of § 1-136(4) is one who has the right to issuance or renewal of a permit, i.e., has met the requirements for issuance of a permit, and has not been deprived of that right by operation of § 1-136(3). Forgé is not such a person; having never satisfied the experience requirement of § 1-136.02, Forgé has never had the right to issuance of a permit in the first place.

[8] This reading of the Public Accountancy Act is also compelled by §§ 1-117 and 1-122, which would otherwise be in conflict. Appellate courts must, as far as practicable, give effect to the language of a statute and reconcile the different provisions of it so they are consistent, harmonious, and sensible. *In re Interest of Jeremy T.*, 257 Neb. 736, 600 N.W.2d 747 (1999). Pursuant to § 1-117, a person who has completed the CPA examination nonetheless shall “have no status” as a CPA unless he or she has *both* (1) been issued a certificate and (2) has the requisite experience. Yet, Forgé’s reading of the statutes would permit such a person, with “no status as a certified public accountant,” to be an inactive CPA and, pursuant to § 1-122(1), be “known as a certified public accountant and . . . use the abbreviation C.P.A.” This conflict is resolved, however, if the inactive classification created under § 1-136(4) is limited to those who have met all the requirements for issuance of an active permit, because such persons have successfully completed the CPA examination, been issued a CPA certificate, and have the requisite experience and, thus, may both have the “status” of certified public accountants pursuant to § 1-117 and “be known as” certified public accountants pursuant to § 1-122(2).

[9] For the foregoing reasons, we hold that a “certificate holder or registrant who has not lost his or her right to issuance or

renewal of a permit,” who may be classified as inactive pursuant to § 1-136(4), is a person who is otherwise entitled to issuance of a permit under the requirements set forth in § 1-136(1) and the remainder of the Public Accountancy Act. In this case, it is not disputed that Forç  t has not met those requirements. Therefore, the court did not err in determining that Forç  t was not an “inactive” CPA within the meaning of § 1-136(4). The foregoing analysis is dispositive of Forç  t’s first and fourth assignments of error.

Forç  t’s remaining assignments of error are directed generally at the court’s factual determination that Forç  t violated the requirements of the Public Accountancy Act and Board regulations by holding himself out to be a CPA. Section § 1-151(1) provides, in relevant part:

No person shall assume or use the title or designation certified public accountant or the abbreviation C.P.A. or any other title, designation, words, letters, abbreviation, sign, card, or device tending to indicate that such person is a certified public accountant unless such person (a) is classified as inactive under section 1-136 or (b) has been issued a certificate as a certified public accountant under sections 1-114 to 1-124 and holds a permit issued under subsection (1)(a) of section 1-136 which is not revoked or suspended

The Board regulations provide in part:

“Holding out to the public as a permit holder” As that term is used in these rules and in the definition of the practice of public accountancy, it means any representation that a person holds a permit to practice in connection with an offer to perform or the performance of services to the public. Any such representation is presumed to invite the public to rely upon the professional skills implied by the permit in connection with services offered to be performed. For purposes of this definition and these rules, a representation shall be deemed to include any oral or written communication conveying that a licensee holds a permit, including the use of titles or legends displayed in letterheads, business cards, office doors, advertisements, and listings.

288 Neb. Admin. Code, ch. 3, § 001.09 (1999).

“Practice of public accountancy” shall mean the performance or offering to perform by a person holding himself out

to the public as a permit holder, for a client or potential client, of one or more kinds of services involving:

...
001.17B one or more kinds of management advisory or consulting services, or the preparation of tax returns or the furnishing of advice on tax matters.

288 Neb. Admin. Code, ch. 3, § 001.17 (1999).

The record in this case, summarized above, clearly demonstrates the existence of competent evidence to support the court's findings. On two separate occasions—one occurring after the issuance of a cease and desist notice—Forgét listed the Forgét Firm in the telephone directory under the category “Accountants—Certified Public.” A reasonable member of the public would be likely to conclude that a person listed under that category would, in fact, be a CPA, which Forgét was not. Furthermore, Forgét's Web page, prior to the filing of a complaint against him by the Board, identified him as a CPA, without conditions. Other representations made by Forgét included various qualifications such as “certificate” and “Registrant,” neither of which was likely to convey to the public that Forgét was, in actuality, not permitted to practice public accountancy.

Nor does Forgét's purported “inactive” classification preclude a finding that Forgét violated the relevant statutes and regulations. “Whenever using ‘Certified Public Accountant’ or ‘CPA’ with his or her name, an inactive registrant shall use the disclaimer ‘Inactive Registrant’ in parentheses immediately after the title or abbreviation.” 288 Neb. Admin. Code, ch. 7, § 003.01 (1999). Even assuming that Forgét acted in reliance on the Board's registration of his “inactive” status and that the Board was somehow estopped from denying such status—an argument that Forgét does not raise—Forgét still failed, on *any* of the instances reflected in the record, to comply with the plain and unambiguous requirement of chapter 7, § 003.01, of the Board's regulations. Even if Forgét had actually been an inactive CPA within the meaning of § 1-136(4)—an argument we reject above—he would still not have been in compliance with § 003.01.

The obvious and reasonable purpose expressed in the Public Accountancy Act, and the Board's associated regulations, is to protect the public by ensuring that the public is able to distinguish

among those who are permitted to practice public accountancy and those who are not. Forgé's actions, reflected in the record, contravened this purpose. The district court did not err in its factual findings regarding Forgé's violation of the relevant statutes and regulations. Forgé's assignments of error to the contrary are without merit.

CONCLUSION

Forgé was not an "inactive" CPA within the meaning of § 1-136, and his conduct violated the Public Accountancy Act and the regulations of the Board concerning the unlawful use of the designation "CPA." The district court's order affirming the decision of the Board is affirmed.

AFFIRMED.

IN RE ESTATE OF GEORGE R. PFEIFFER, DECEASED.
HENRIETTA PFEIFFER, APPELLEE, v. CONNIE L. FRATES AND
CHIRLE R. TJADEN, COPERSONAL REPRESENTATIVES, APPELLANTS.
658 N.W.2d 14

Filed March 14, 2003. No. S-01-1401.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Summary Judgment: Jurisdiction: Appeal and Error.** Generally, the denial of a motion for summary judgment is not a final, appealable order. However, when adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct further proceedings as it deems just.
4. **Statutes: Appeal and Error.** When an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below.
5. ____: _____. In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to

interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.

6. **Statutes.** It is not within the province of the courts to read a meaning into a statute that is not there.

Appeal from the County Court for Lincoln County: KENT E. FLOROM, Judge. Affirmed.

Edward D. Steenburg, of McQuillan, Steenburg & McQuillan, P.C., for appellants.

Allen L. Fugate for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, McCORMACK, and MILLER-LERMAN, JJ.

McCORMACK, J.

NATURE OF CASE

This is an appeal from a probate proceeding in which the county court granted partial summary judgment in favor of appellee, Henrietta Pfeiffer. The county court determined that Henrietta was a surviving spouse for purposes of elective share, homestead allowance, exempt property, and family allowance. Appellants, Connie L. Frates and Chirle R. Tjaden, copersonal representatives of the estate of George R. Pfeiffer, appealed. We granted appellants' petition to bypass, and we affirm.

BACKGROUND

George married Henrietta on December 17, 1973. In November 1999, George executed a will purporting to disinherit his wife. In February 2000, George petitioned for legal separation from Henrietta, which Henrietta contested. There was a trial, and a decree of separation was entered on June 26, 2000. The court divided the property of the parties since the parties were not able to agree on the division of property themselves. The decree offset to George the sum of \$426,942, representing his equity in land, equipment, and cattle he brought into the marriage. Included in the decree was a list of assets that each party was to receive. The decree also ordered George to pay Henrietta \$63,668.12 "to equalize the division of property." George paid the monetary judgment, and Henrietta filed a satisfaction of judgment in August 2000.

George died on March 18, 2001. Probate was filed, and appellants, George's daughters from a previous marriage, were appointed as copersonal representatives of his estate. Henrietta filed a petition for elective share and a petition for homestead allowance, exempt property, and family allowance. Appellants filed a motion for summary judgment requesting the court to dismiss Henrietta's petitions. In October, Henrietta filed a motion for partial summary judgment on the issue as to whether she was a surviving spouse for purposes of an elective share, homestead allowance, exempt property, and family allowance. In her affidavit in support of summary judgment, Henrietta alleged that the decree did not divide \$426,942 of the property. In their answer, appellants alleged that the \$426,942 referenced by Henrietta was distributed by the court in the decree by setoff to George as property he brought into the marriage.

The county court, in its order dated November 28, 2001, found that Henrietta was a "surviving spouse" for purposes of elective share, homestead allowance, exempt property, and family allowance. The court found Neb. Rev. Stat. §§ 30-2316(d) and 30-2353(b)(3) (Reissue 1995) to be inapplicable to this case.

ASSIGNMENTS OF ERROR

Appellants assign, rephrased, that the county court erred (1) in finding that the decree of separation entered by the district court did not constitute a waiver of the rights to elective share, homestead allowance, exempt property, and family allowance; (2) in finding that Henrietta was a surviving spouse for purposes of elective share, homestead allowance, exempt property, and family allowance as defined in chapter 30, article 23, of the Nebraska Probate Code; (3) by ordering that appellants were not entitled to summary judgment in connection with the petition filed by Henrietta for elective share, homestead allowance, exempt property, and family allowance; and (4) by ordering that Henrietta was entitled to partial summary judgment in connection with her petitions for elective share, homestead allowance, exempt property, and family allowance.

STANDARD OF REVIEW

[1-3] Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no

genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Day v. Heller*, 264 Neb. 934, 653 N.W.2d 475 (2002). In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Reinke Mfg. Co. v. Hayes*, 256 Neb. 442, 590 N.W.2d 380 (1999); *Dvorak v. Bunge Corp.*, 256 Neb. 341, 590 N.W.2d 682 (1999). Generally, the denial of a motion for summary judgment is not a final, appealable order. However, when adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct further proceedings as it deems just. *Neff Towing Serv. v. United States Fire Ins. Co.*, 264 Neb. 846, 652 N.W.2d 604 (2002); *Knudsen v. Mutual of Omaha Ins. Co.*, 257 Neb. 912, 601 N.W.2d 725 (1999).

[4] When an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below. *Jacobson v. Solid Waste Agency of Northwest Neb.*, 264 Neb. 961, 653 N.W.2d 482 (2002); *Shirley v. Neth*, 264 Neb. 138, 646 N.W.2d 587 (2002); *Salkin v. Jacobsen*, 263 Neb. 521, 641 N.W.2d 356 (2002).

ANALYSIS

There are two issues presented on appeal: first, whether Henrietta is *not* a surviving spouse as defined by § 30-2353(b)(3), and second, whether Henrietta waived her statutory rights as defined by § 30-2316(d).

SURVIVING SPOUSE

Nebraska has adopted a portion of the Uniform Probate Code. Section 30-2353 of the Nebraska Probate Code, which is substantially the same as Unif. Probate Code § 2-802, 8 U.L.A. 210 (1998), specifically sets forth who is *not* a surviving spouse as follows:

(a) An individual who is divorced from the decedent or whose marriage to the decedent has been dissolved or annulled by a decree that has become final is not a surviving spouse unless, by virtue of a subsequent marriage, he is married to the decedent at the time of death. *A decree of separation which does not terminate the status of husband and wife is not a divorce for purposes of this section.*

(b) For purposes of parts 1, 2, 3, and 4 of this article and of section 30-2412, a surviving spouse does not include:

....

(3) *an individual who was a party to a valid proceeding concluded by an order purporting to terminate all marital property rights against the decedent.*

(Emphasis supplied.)

Section 30-2353(a) clearly states that a decree of separation is not a divorce. Appellants do not allege that George and Henrietta were divorced, and they admit that Henrietta was married to George at the time of his death. However, appellants allege that Henrietta is not a surviving spouse as defined by § 30-2353(b)(3). Appellants contend that Henrietta was a party to a valid proceeding which terminated all marital property rights against the decedent. Therefore, appellants assert that Henrietta is not a surviving spouse.

The county court found § 30-2353(b)(3) inapplicable to this case. The county court held that the decree of separation at issue in this case did not contain language “purporting to ‘terminate all marital property rights’” as expressly required by this section. We agree.

The decree of separation ordered George and Henrietta to live separately and apart. The county court found the decree to offset to George some property brought into the marriage in the total sum of \$426,942. The decree also awarded several property items to George and Henrietta respectively. Finally, the court ordered that George shall pay to Henrietta the sum of \$63,668.12 “in order to equalize the division of property.” We find no language in the decree that definitively states that the property awards are not subject to any claim by the other party or that makes mention of the marital interest of either party in the property that was divided. We decline to read any such language into the court’s decree.

Since we find no language in the order purporting to terminate all marital property as required by § 30-2353(b)(3), we determine that this section is inapplicable to this case. As such, Henrietta is a surviving spouse for purposes of elective share, homestead allowance, exempt property, and family allowance.

WAIVER

Section 30-2316 of the Nebraska Probate Code, which is substantially the same as Unif. Probate Code § 2-213, 8 U.L.A. 129 (1998), specifically sets forth the statutory provisions pertaining to waiver of the rights to elective share, homestead allowance, exempt property, and family allowance and provides in relevant part:

(a) The right of election of a surviving spouse and the rights of the surviving spouse to homestead allowance, exempt property, and family allowance, or any of them, may be waived, wholly or partially, before or after marriage, by a written contract, agreement, or waiver signed by the surviving spouse.

....

(d) Unless it provides to the contrary, a waiver of “all rights”, or equivalent language, in the property or estate of a present or prospective spouse or *a complete property settlement entered into after or in anticipation of separation, divorce, or annulment is a waiver of all rights to elective share, homestead allowance, exempt property, and family allowance by each spouse in the property of the other and a renunciation by each of all benefits that would otherwise pass to him or her from the other by intestate succession or by virtue of any will executed before the waiver or property settlement.*

(Emphasis supplied.) We also note Unif. Probate Code § 2-802, comment, 8 U.L.A. 211 (1998), (the model for Nebraska Probate Code § 30-2353, which we discussed previously) specifically states, “Where there is only a legal separation, rather than a divorce, succession patterns are not affected; but if the separation is accompanied by a complete property settlement, this may operate under Section [30-2316] as a waiver or renunciation of benefits under a prior will and by intestate succession.” We must

now determine whether a legal separation accompanied by a court-ordered division of property constitutes a waiver as promulgated by § 30-2316(d).

The county court found § 30-2316(d) inapplicable to this case. The court read § 30-2316(d) to require the parties to agree to the property settlement and to include a waiver by the spouse as to his or her rights to elective share. The court found no evidence in the record to support the argument that the parties entered into an agreed property settlement or that Henrietta had waived her rights to elective share. The property division was not by settlement between the parties, but was the decision of the trial court in a contested matter. Therefore, the county court found § 30-2316(d) clearly not applicable to the decree of separation.

On appeal, appellants maintain that the decree of separation fits within the definition of § 30-2316(d) as a complete property settlement entered into after or in anticipation of separation, divorce, or annulment and as such constitutes a waiver of all rights to elective share, homestead allowance, exempt property, and family allowance. Appellants argue subsection (d) does not contain language requiring an “agreement” of the parties. They argue this language is found only in subsection (a), which they do not rely on. Appellants assert that a contested separation which forces the court to divide the marital property should not change the decree’s effect on waiver of such rights. In essence, appellants urge this court to interpret subsection (d) as an implied waiver absent an agreement by the parties. We decline to do so.

[5,6] In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *In re Interest of J.K.*, ante p. 253, 656 N.W.2d 253 (2003); *Henderson v. Henderson*, 264 Neb. 916, 653 N.W.2d 226 (2002). It is not within the province of the courts to read a meaning into a statute that is not there. *Shaul v. Lang*, 263 Neb. 499, 640 N.W.2d 668 (2002); *Creighton St. Joseph Hosp. v. Tax Eq. & Rev. Comm.*, 260 Neb. 905, 620 N.W.2d 90 (2000); *Ramsey v. State*, 259 Neb. 176, 609 N.W.2d 18 (2000). Section 30-2316(d) states that “a complete property *settlement* entered into after or in anticipation of separation . . . is a waiver of all rights.” (Emphasis supplied.)

Henrietta contested the legal separation. Subsequently, the court ordered a disposition of property in the decree of separation. These two facts show conclusively that the parties could not agree on a property settlement. Since we find no settlement entered into as prescribed by the plain meaning of the words, we agree with the county court's findings that § 30-2316(d) is inapplicable to this case. The term "settlement" implies a meeting of the minds of the parties to a transaction or controversy; an adjustment of differences or accounts, or a coming to an agreement. *Horace Mann Cos. v. Pinaire*, 248 Neb. 640, 538 N.W.2d 168 (1995). The decree of separation does not constitute a waiver as promulgated by the statute.

CONCLUSION

We conclude that the county court did not err in granting partial summary judgment to Henrietta. We conclude that Henrietta is a surviving spouse for purposes of elective share, homestead allowance, exempt property, and family allowance. We therefore affirm the decision of the county court.

AFFIRMED.

KUGLER COMPANY, A NEBRASKA CORPORATION,
APPELLANT, v. GROWTH PRODUCTS LTD., INC.,
A NEW YORK CORPORATION, APPELLEE.

658 N.W.2d 40

Filed March 14, 2003. No. S-02-099.

1. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent from the trial court's; however, when a determination rests on factual findings, a trial court's decision on the issue will be upheld unless the factual findings concerning jurisdiction are clearly incorrect.
2. **Due Process: Jurisdiction: Proof.** Before a court can exercise personal jurisdiction over a nonresident defendant, the court must determine, first, whether the long-arm statute is satisfied and, if the long-arm statute is satisfied, second, whether minimum contacts exist between the defendant and the forum state for personal jurisdiction over the defendant without offending due process.

3. **Constitutional Law: Jurisdiction.** Neb. Rev. Stat. § 25-536(2) (Reissue 1995) expressly extends Nebraska's jurisdiction over nonresidents to the extent the U.S. Constitution permits.
4. **Constitutional Law: Due Process.** The Due Process Clause of the U.S. Constitution protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he or she has established no meaningful contacts, ties, or relations.
5. **Due Process: Jurisdiction: States.** To subject an out-of-state defendant to personal jurisdiction in a forum court, due process requires that the defendant have certain minimum contacts with the forum state so as not to offend traditional notions of fair play and substantial justice.
6. ____: ____: _____. The benchmark for determining if the exercise of personal jurisdiction satisfies due process is whether the defendant's minimum contacts with the forum state are such that the defendant should reasonably anticipate being haled into court there.
7. **Due Process: Jurisdiction.** A personal jurisdiction analysis requires a court to consider the quality and nature of the defendant's activities to ascertain whether the defendant has the necessary minimum contacts with the forum to satisfy due process.
8. **Jurisdiction: States.** The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state.
9. ____: ____: _____. When considering the issue of personal jurisdiction, it is essential in each case that there be some act by which the defendant purposely avails himself or herself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.
10. **Due Process: Jurisdiction.** Due process does not require a defendant's physical presence in the forum before personal jurisdiction is exercised.
11. **Jurisdiction: Contracts: States.** The existence of a contract with a party in a forum state or the mere use of interstate facilities, such as telephones and mail, does not, in and of itself, provide the necessary contacts for personal jurisdiction.
12. ____: ____: _____. The existence of a contract and the use of interstate communications may be considered in an overall personal jurisdiction analysis.
13. **Jurisdiction: Parties.** When considering the issue of personal jurisdiction, a court will consider the prior negotiations between the parties and contemplated consequences, and if a substantial connection is created, even a single contact can support jurisdiction.
14. **States: Parties: Statutes.** Parties who reach out beyond one state and create continuing relationships and obligations with citizens of another state are subject to regulation and sanctions in the other state for the consequences of their activities.
15. **Jurisdiction: States.** When weighing the facts to determine whether the exercise of personal jurisdiction would comport with fair play and substantial justice, a court may consider (1) the burden on the defendant, (2) the interest of the forum state, (3) the plaintiff's interest in obtaining relief, (4) the judicial system's interest in obtaining the most efficient resolution of controversies, and (5) the shared interest of the several states in furthering fundamental substantive social policies.
16. **Jurisdiction.** Where a defendant who purposefully has directed his or her activities at forum residents seeks to defeat jurisdiction, the defendant must present a

compelling case that the presence of some other considerations would render jurisdiction unreasonable.

Appeal from the District Court for Red Willow County: JOHN J. BATTERSHELL, Judge. Reversed and remanded for further proceedings.

R. Kevin O'Donnell and Charles J. Stolz, of McGinley, O'Donnell, Reynolds & Edwards, P.C., for appellant.

Edward F. Noethe, of McGinn, McGinn, Jennings & Springer, for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

The appellant, Kugler Company, filed a petition against the appellee, Growth Products Ltd., Inc., alleging breach of contract and breach of express and implied warranties. The district court determined that it lacked personal jurisdiction over Growth Products, sustained its special appearance, and dismissed the petition. Kugler appeals. Because Growth Products had an ongoing relationship with Kugler and encouraged Kugler to distribute its products in Nebraska, we reverse, and remand for further proceedings.

BACKGROUND

Kugler is a company located in McCook, Nebraska. Growth Products is a New York corporation with its principal place of business in New York. Growth Products does not own property in Nebraska and does not maintain a Nebraska office.

In 1992, an employee of Kugler became aware of Growth Products from an advertisement in a trade journal that Kugler subscribed to. According to Kugler, the employee contacted Growth Products by telephone and then began to receive regular telephone contact from Growth Products. Between 1992 and 1999, Kugler purchased about 399 tons of nitrogen products from Growth Products at an approximate cost of \$179,472. The product at issue was manufactured for Growth Products by a company in Wisconsin; Kugler went to Wisconsin to pick up the product.

In 1995, Clare H. Reinbergen, the president of Growth Products, wrote a letter expressing a desire to arrange a visit with the president of Kugler. In August 1996, Reinbergen wrote a letter to Kugler about meeting to discuss opportunities involving the distribution of products supplied by Growth Products. The letter described Growth Products' intention to enter the "ag market and begin advertising in trade magazines such as 'Ag Retailer' and 'Farm Chemicals.'" Growth Products stated that it would also be represented at trade shows.

In March 1997, Reinbergen sent a letter to Kugler congratulating it on becoming an assigned distributor. The letter stated that representatives of Growth Products would visit Kugler's location. It described ways the representatives would assist Kugler in distributing its products. Another 1997 letter from Growth Products stated, "It is our goal to continue to grow this relationship and business together, expanding and reaching new levels of profitability." The letter enclosed a distributor handbook entitled "Partners in Success," which Growth Products described as a "full support program." The handbook described Growth Products' expectations of its distributors, which included (1) the maintenance of an adequate inventory investment in its products, (2) a minimum sales requirement, and (3) an expectation that the distributor would participate in joint marketing efforts and invite Growth Products' participation in sales and promotional opportunities.

Growth Products described in its handbook how it would support the distributor, including (1) the assignment of a technical sales representative to the distributor, (2) the expectation of a yearly management meeting to plan goals and tactics, (3) the sponsorship of training seminars, and (4) the provision of a cooperative advertising allowance and promotional materials. Growth Products stated that it would pay for the distributor's first advertisement and could provide predesigned advertisements. It also provided incentives for the distributor to advertise by giving monetary credits for using a Growth Products' registered trademark or clip art in local advertising materials or catalogs. Growth Products offered to help pay for the printing of newsletters that featured its products and stated that it would help write the copy. The handbook included an order form to order more handbooks for sales

representatives. The handbook also contained a 1997 advertising schedule showing that between January and September, advertisements would be placed in "Golf Course Management Magazine," "Turf Magazine," and "Arbor Age."

According to Kugler's marketing manager, Ron Soden, Reinbergen held a sales meeting at the Kugler headquarters in 1996. After the meeting, either Reinbergen or her assistant began to contact Soden by telephone a couple of times a month to solicit sales for their products. Growth Products also sent Soden a comprehensive sales handbook which included the "Partners in Success" materials, product information, and promotional materials.

In 1998, the Van Diest Company of McCook began having problems with a Growth Products nitrogen product that it had purchased from Kugler. Growth Products visited the Van Diest office and later began soliciting the company directly by telephone for sales of their products. Reinbergen then sent a letter to Van Diest inviting it to participate in Growth Products' 1999 incentive program and explaining that participation would allow Van Diest to begin to work its way up to distributor status.

The record contains an affidavit from Reinbergen stating that Growth Products has never solicited or conducted business in Nebraska or advertised for business in Nebraska. According to Reinbergen, Growth Products has never derived substantial revenue from goods used in Nebraska.

Kugler filed a petition alleging that in 1999, it purchased two shipments of "Nitro-30" from Growth Products for \$25,809.03. Kugler alleged that the Nitro-30 was defective and that Growth Products refused to issue a refund. According to Kugler, it incurred additional damages of about \$16,868 because it had to clean tanks and dispose of the product. In her affidavit, Reinbergen states that a Kugler employee called Growth Products to place the orders for the Nitro-30.

Growth Products filed a special appearance, objecting to personal jurisdiction. Relying primarily on *Dunham v. Hunt Midwest Entertainment*, 2 Neb. App. 969, 520 N.W.2d 216 (1994), the court found that Growth Products did not purposely direct activities at the state and that the claim did not arise out of any forum-related activities. Thus, the court determined that Growth

Products lacked sufficient minimum contacts with Nebraska to establish personal jurisdiction and that exercising jurisdiction over Growth Products would not comport with fair play and substantial justice. The court sustained the special appearance and dismissed the petition. Kugler appeals.

ASSIGNMENT OF ERROR

Kugler assigns, rephrased, that the district court erred by sustaining the special appearance.

STANDARD OF REVIEW

[1] When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent from the trial court's; however, when a determination rests on factual findings, a trial court's decision on the issue will be upheld unless the factual findings concerning jurisdiction are clearly incorrect. *Holste v. Burlington Northern RR. Co.*, 256 Neb. 713, 592 N.W.2d 894 (1999).

ANALYSIS

Kugler contends that Growth Products had sufficient contacts with Nebraska for the court to assert personal jurisdiction over it. Kugler argues that Growth Products' communications with Kugler to solicit sales and visits by representatives of Growth Products should be considered in determining whether Kugler had sufficient minimum contacts with Nebraska. Kugler also notes that Growth Products advertised in several magazines with national circulation. Growth Products argues, however, that it has no physical presence in Nebraska and that the sales in Nebraska were initiated by Kugler. Growth Products further contends that there are insufficient minimum contacts because the product at issue was manufactured in Wisconsin and because Kugler went there to pick it up.

[2] Before a court can exercise personal jurisdiction over a nonresident defendant, the court must determine, first, whether the long-arm statute is satisfied and, if the long-arm statute is satisfied, second, whether minimum contacts exist between the defendant and the forum state for personal jurisdiction over the defendant without offending due process. *Holste v. Burlington*

Northern RR. Co., *supra*; *Crete Carrier Corp. v. Red Food Stores*, 254 Neb. 323, 576 N.W.2d 760 (1998).

Nebraska's long-arm statute, Neb. Rev. Stat. § 25-536 (Reissue 1995), provides:

A court may exercise personal jurisdiction over a person:

(1) Who acts directly or by an agent, as to a cause of action arising from the person:

(a) Transacting any business in this state;

(b) Contracting to supply services or things in this state;

...

(2) Who has any other contact with or maintains any other relation to this state to afford a basis for the exercise of personal jurisdiction consistent with the Constitution of the United States.

[3] Under § 25-536(1)(a) and (b), Growth Products is subject to the terms of the long-arm statute. Further, § 25-536(2) expressly extends Nebraska's jurisdiction over nonresidents to the extent the U.S. Constitution permits. *Crete Carrier Corp. v. Red Food Stores*, *supra*. Thus, we next address whether Growth Products had such contacts with Nebraska that the exercise of personal jurisdiction would not offend federal constitutional principles of due process.

[4,5] The Due Process Clause of the U.S. Constitution protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he or she has established no meaningful contacts, ties, or relations. *Crete Carrier Corp. v. Red Food Stores*, *supra*, citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985). To subject an out-of-state defendant to personal jurisdiction in a forum court, due process requires that the defendant have certain minimum contacts with the forum state so as not to offend "traditional notions of fair play and substantial justice." *Internat. Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed 95 (1945); *Crete Carrier Corp. v. Red Food Stores*, *supra*. Thus, the determination whether the court has jurisdiction is a two-step process. First, we determine whether Growth Products had the necessary minimum contacts with Nebraska; second, if such minimum contacts have been established, the contacts may be considered in light of other factors to determine whether the

assertion of personal jurisdiction would comport with fair play and substantial justice. See *Crete Carrier Corp. v. Red Food Stores*, *supra*.

MINIMUM CONTACTS

[6,7] The benchmark for determining if the exercise of personal jurisdiction satisfies due process is whether the defendant's minimum contacts with the forum state are such that the defendant should reasonably anticipate being haled into court there. *Id.* This analysis requires that we consider the quality and nature of the defendant's activities to ascertain whether the defendant has the necessary minimum contacts with the forum to satisfy due process. *Internat. Shoe Co. v. Washington*, *supra*; *Crete Carrier Corp. v. Red Food Stores*, *supra*; *Williams v. Gould, Inc.*, 232 Neb. 862, 443 N.W.2d 577 (1989).

[8,9] The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state. *Crete Carrier Corp. v. Red Food Stores*, 254 Neb. 323, 576 N.W.2d 760 (1998). Rather, it is essential in each case that there be some act by which the defendant purposely avails himself or herself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. *Id.* This requirement ensures that a defendant will not be subject to litigation in a jurisdiction solely due to random, fortuitous, or attenuated contacts. *Id.*

[10-13] Due process, however, does not require a defendant's physical presence in the forum before personal jurisdiction is exercised. *Quill Corp. v. North Dakota*, 504 U.S. 298, 112 S. Ct. 1904, 119 L. Ed. 2d 91 (1992); *Crete Carrier Corp. v. Red Food Stores*, *supra*. Also, the existence of a contract with a party in a forum state or the mere use of interstate facilities, such as telephones and mail, does not, in and of itself, provide the necessary contacts for personal jurisdiction. *Crete Carrier Corp. v. Red Food Stores*, *supra*. But this does not mean that the existence of a contract and the use of interstate communications may not be considered in the overall analysis. *Id.* We will also consider the prior negotiations between the parties and contemplated consequences. See, *id.*; *Williams v. Gould Inc.*, *supra*. Further, if a substantial connection is created, even a single

contact can support jurisdiction. See *Crete Carrier Corp. v. Red Food Stores*, *supra*.

[14] Parties who ““reach out beyond one state and create continuing relationships and obligations with citizens of another state” are subject to regulation and sanctions in the other State for the consequences of their activities.’” *McGowan Grain v. Sanburg*, 225 Neb. 129, 138, 403 N.W.2d 340, 347 (1987), quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985).

Here, it is clear that there was an ongoing relationship between Kugler and Growth Products that was intended to market products sold under the Growth Products label in Nebraska. The record contains the statements of Kugler employees that Growth Products called them to solicit sales. This assertion is corroborated by written communications from Reinbergen seeking to set up a meeting and stating a goal to continue to grow the relationship between the companies and reach new levels of profitability. Reinbergen also visited Nebraska to hold a sales meeting. Kugler became an assigned distributor for Growth Products and was offered assistance from Growth Products for the marketing of its products. Over a period of years, Kugler purchased 399 tons of products from Growth Products. Growth Products then later solicited another Nebraska company to distribute its products. Here, we are not dealing with an isolated sale to a Nebraska citizen. Instead, the record shows numerous transactions with the intent to distribute and sell the products to Nebraska citizens.

Growth Products argues that because the product was manufactured for Growth Products by a Wisconsin company and that Kugler picked up the product in Wisconsin, it lacked direct contact with Nebraska. Here, taking delivery in Wisconsin is not significant. The product was sold to Kugler by Growth Products, and Kugler was Growth Products’ assigned distributor of the products in Nebraska. The record shows that Growth Products encouraged Kugler’s efforts to distribute its products in Nebraska and gave assistance that would help serve its market in Nebraska.

Growth Products also argues that *Dunham v. Hunt Midwest Entertainment*, 2 Neb. App. 969, 520 N.W.2d 216 (1994), dictates a different result. We disagree. In *Dunham*, the Nebraska Court of Appeals determined that there were insufficient minimum

contacts to establish personal jurisdiction when a Missouri amusement park placed numerous advertisements in Nebraska and sold tickets in Nebraska. But unlike *Dunham*, where the contacts were aimed at enticing people to leave Nebraska to visit a location in Missouri, Growth Products advertised products that would be purchased for use or resale in Nebraska. Further, by making Kugler an assigned distributor, Growth Products actively encouraged the sales of products in Nebraska. Thus, *Dunham* is inapplicable to this case. We conclude that the court was incorrect as a matter of law when it determined that the claim did not arise out of any forum-related activities and that Growth Products had insufficient minimum contacts with Nebraska to satisfy due process. To the extent the court made a finding of fact that Growth Products never purposely directed activities at Nebraska, we conclude that the district court was clearly wrong.

FAIR PLAY AND SUBSTANTIAL JUSTICE

[15,16] We next weigh the facts to determine whether the exercise of personal jurisdiction would comport with “‘fair play and substantial justice.’” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 486, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985); *Crete Carrier Corp. v. Red Food Stores*, 254 Neb. 323, 576 N.W.2d 760 (1998). In doing so, we may consider (1) the burden on the defendant, (2) the interest of the forum state, (3) the plaintiff’s interest in obtaining relief, (4) the judicial system’s interest in obtaining the most efficient resolution of controversies, and (5) the shared interest of the several states in furthering fundamental substantive social policies. *Id.* These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required. *Burger King Corp. v. Rudzewicz*, *supra*; *Crete Carrier Corp. v. Red Food Stores*, *supra*. In addition, when, as here, a defendant who purposefully has directed his or her activities at forum residents seeks to defeat jurisdiction, the defendant must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable. *Id.*

With the increasing nationalization of commerce and the ease of modern communication, defense of an action is less burdensome in a state where he or she engages in economic activity. We

recognized as early as 1987 a discernible trend toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. *McGowan Grain, Inc. v. Sanburg*, 225 Neb. 129, 403 N.W.2d 340 (1987).

Here, the court did not find that it would be burdensome on Growth Products to litigate the action in Nebraska. In addition, Growth Products has not presented evidence of any “other considerations” affecting fair play and substantial justice that would weigh against an exercise of personal jurisdiction over it. Growth Products has failed to show that an exercise of jurisdiction over it would offend notions of fair play and substantial justice.

CONCLUSION

We conclude that by soliciting sales from Kugler, holding a sales meeting in Nebraska, creating a distributorship relationship with Kugler, and encouraging the sale of its products in Nebraska, Growth Products had sufficient minimum contacts to establish personal jurisdiction. Growth Products has not shown that any other considerations apply that would weigh against an exercise of jurisdiction. Accordingly, we reverse, and remand for further proceedings.

REVERSED AND REMANDED FOR
FURTHER PROCEEDINGS.

PETER JEFFREY HARTMAN, APPELLEE, V.

DENISE KELLY HARTMAN, APPELLANT.

657 N.W.2d 646

Filed March 14, 2003. No. S-02-119.

1. **Motions to Vacate: Time: Appeal and Error.** The decision to vacate an order anytime during the term in which the judgment is rendered is within the discretion of the court; such a decision will be reversed only if it is shown that the district court abused its discretion.
2. **Courts: Motions to Vacate.** A district court has the inherent authority to vacate or modify a decision within the same term that the decision is rendered.
3. **Judgments: Words and Phrases.** An abuse of discretion occurs when the trial court’s decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.

Appeal from the District Court for Douglas County: W. MARK ASHFORD, Judge. Affirmed.

Robin L. Binning, of Binning & Plambeck, for appellant.

Amy Sherman Geren, of Geren Law Office, for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, McCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

Denise Kelly Hartman moved to vacate a decree dissolving her marriage to Peter Jeffrey Hartman, claiming that due to her mental illness, the trial court was required to appoint a guardian ad litem for her pursuant to Neb. Rev. Stat. § 42-362 (Cum. Supp. 2002). Denise appeals from a denial of that motion.

FACTS

The parties were married on June 1, 1996, in Douglas County, Nebraska, and separated in October 1999. Two children were born of the marriage, the first on June 17, 1998, and the second on September 16, 1999. Peter filed a petition for dissolution in the district court for Douglas County on March 9, 2000. Prior to trial, Peter sought an order requiring Richard Young Mental Health Center to release records pertaining to treatment received by Denise at that facility subsequent to the parties' separation. Denise agreed, and the order was entered upon the stipulation of the parties. Subsequently, Peter filed a motion seeking release of all mental health records pertaining to the care and treatment received by Denise. The court entered an order requiring such release. Two days before the scheduled trial in December 2000, Denise sought a continuance to allow time for her to undergo a complete psychological evaluation. The requested continuance was apparently granted, and trial commenced on April 6, 2001.

Both parties were represented by counsel at trial. Glenda Cottam, a clinical psychologist qualified as an expert in psychology, testified on behalf of Denise. Cottam testified that Denise exhibited a bipolar disorder, with depression as the predominant feature at the time of trial. Cottam testified that Denise had been taking psychotropic medications, which she discontinued without the permission of her treating physician. However, Cottam

expressed her opinion that with regular counseling and appropriate medical care, Denise was able to act as a fit parent. The court also received documentary evidence reflecting that Denise had been diagnosed and treated for a bipolar disorder. There was no evidence that this condition rendered her incompetent.

During the trial, the parties reached agreement and stipulated through their respective counsel that legal and physical custody of the minor children be awarded to Peter, with Denise having visitation every other weekend and every Thursday evening, as well as on specified holidays. The court indicated that it would accept the stipulation, subject to a requirement that Denise receive psychiatric treatment. There was no request for or discussion of appointment of a guardian ad litem for Denise at any time during the trial or pretrial proceedings.

On June 25, 2001, the court entered a decree dissolving the marriage, dividing marital property and debts, and awarding custody and visitation rights as agreed by the parties. The decree included a requirement that Denise pay child support of \$150 per month for two children. The court noted in its decree:

This child support obligation represents a deviation from the calculation offered by the Respondent at the time of trial and attached hereto. Said deviation is based upon the Court's specific factual finding that the Respondent suffers from significant mental health conditions which will require the incurring of medical expenses and medication expenses by the Respondent. Said care is needed by Respondent to continue being an effective care-giver for her children during periods of visitation.

The decree also required Peter to pay Denise alimony of \$450 per month for 20 months. Neither party appealed from the decree.

On August 23, 2001, Denise, now represented by different counsel, filed an application to vacate the decree of dissolution pursuant to "Neb. Rev. Stat. §25-2001 (3)&(7), or pursuant to the independent equity powers of this Court." Denise alleged that although the pleadings and evidence showed that she was mentally ill, the court did not appoint her a guardian ad litem as required by § 42-362.

On August 23, 2001, at the hearing on the application to vacate, Denise testified and offered the record from the dissolution

proceedings in support of her motion. The court denied the motion to vacate on grounds that Denise was represented by counsel throughout the dissolution proceedings and that she did not file a motion for new trial or appeal from the decree.

On September 20, 2001, Denise appealed the district court's dismissal of her motion to vacate. Denise's appeal was dismissed pursuant to Neb. Ct. R. of Prac. 7A(2) (rev. 2000) because the district court's order denying the application to vacate the decree was not properly date stamped. See *Hartman v. Hartman*, 10 Neb. App. liv (No. A-01-1051, Dec. 4, 2001). Denise subsequently filed a motion for final order of the court, and on December 31, 2001, a final order was properly filed. Denise then perfected this timely appeal.

ASSIGNMENT OF ERROR

Denise assigns that the district court erred as a matter of law when it denied her application to vacate the decree of dissolution pursuant to the court's equity powers and/or Neb. Rev. Stat. § 25-2001 (Cum. Supp. 2002), based on the fact that she was not appointed a guardian ad litem pursuant to § 42-362.

STANDARD OF REVIEW

[1] The decision to vacate an order anytime during the term in which the judgment is rendered is within the discretion of the court; such a decision will be reversed only if it is shown that the district court abused its discretion. See, *Talkington v. Womens Servs.*, 256 Neb. 2, 588 N.W.2d 790 (1999); *First Fed. Sav. & Loan Assn. v. Wyant*, 238 Neb. 741, 472 N.W.2d 386 (1991).

ANALYSIS

Denise sought to have the decree of dissolution vacated "pursuant to Neb. Rev. Stat. §25-2001 (3)&(7), or pursuant to the independent equity powers of this Court." On appeal, Denise assigns that the district court erred in failing to vacate the decree "pursuant to the court's equity powers, and/or §25-2001." Brief for appellant at 4. We note that the statutory provisions which Denise relies upon and which were formerly codified at Neb. Rev. Stat. § 25-2001(3) and (7) (Cum. Supp. 1998), were recodified in 2000 as § 25-2001(4)(a) and (f) (Cum. Supp. 2002). These provisions provide in pertinent part:

A district court may vacate or modify its own judgments or orders after the term at which such judgments or orders were made (a) for mistake, neglect, or omission of the clerk, or irregularity in obtaining a judgment or order . . .

(f) for unavoidable casualty or misfortune, preventing the party from prosecuting or defending

§ 25-2001(4). These statutory grounds plainly apply to modification or vacation of a judgment *after* the term of court at which it was entered. In this case, the application to vacate was made during the same term that the decree was entered. The term of the district court for Douglas County is coextensive with the calendar year. See Rules of Dist. Ct. of Fourth Jud. Dist. 4-1C (rev. 1995). The decree in this case was signed by the district judge on June 22, 2001, and file stamped June 25. As the application to vacate was filed on August 23, Denise clearly sought to have the judgment set aside in the same term in which it was entered.

[2] Although the statutory provisions under § 25-2001(4) are not applicable, § 25-2001(2) expressly provides that “[t]he power of a district court under its equity jurisdiction to set aside a judgment or an order as an equitable remedy is not limited by this section.” It is well settled that a district court has the inherent authority to vacate or modify a decision within the same term that the decision is rendered. *Talkington v. Womens Servs.*, *supra*. Accordingly, a district court has equitable power to vacate a judgment during the term in which it was entered on grounds which include, but are not limited to, those enumerated in § 25-2001(4).

[3] Because the decision to vacate an order within the same term is within the discretion of the court, the decision will be reversed only if it is shown that the district court abused its discretion. *Talkington*, *supra*. An abuse of discretion occurs when the trial court’s decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Id.*

Denise argues that the district court abused its discretion in failing to vacate the decree because the court did not appoint a guardian ad litem for Denise in the dissolution proceedings pursuant to § 42-362. Section 42-362 provides in pertinent part, “When the pleadings or evidence in any action pursuant to sections 42-347 to 42-381 indicate that either spouse is mentally ill,

a guardian ad litem or an attorney, or both, shall be appointed to represent the interests of such spouse.”

Section 42-362 does not define the term “mentally ill.” Denise, however, urges an interpretation of “mentally ill” that would require courts to appoint a guardian ad litem pursuant to § 42-362 for any party in a dissolution proceeding who suffers from mental illness, regardless of the nature and severity of that illness. We need not decide this issue of statutory interpretation, however, because we conclude that the district court did not abuse its discretion in denying the application to vacate the decree, regardless of how the term “mentally ill” in § 42-362 is interpreted.

In its ruling, the district court noted that Denise was represented by counsel throughout the dissolution proceedings and that she did not file a motion for new trial or to perfect an appeal from the decree. The record reflects no explanation for why these steps were not taken. In addition, nothing in the record indicates that Denise’s interests were adversely affected by not having a guardian ad litem appointed.

Denise does not allege that she could not communicate effectively with her counsel during the proceedings. Furthermore, she does not offer any concrete example of how she was prejudiced by not having a guardian ad litem appointed. Denise testified generally that her purpose in attempting to have the court vacate the judgment was to “make sure that my interests are looked out for, so in case I become depressed again or give up, that that doesn’t happen.” She did not, however, specify which of her “interests,” if any, were not “looked out for” in the dissolution proceedings. Denise did testify that she “was not told that [she] could not be present when the children were picked up” following visitations. However, when asked if there was anything else she did not understand, Denise responded, “That was it.”

We also note that the claim which Denise asserts as grounds for vacating the decree could have been asserted on appeal. Indeed, we held in *Penn Mutual Life Ins. Co. v. Sweeney*, 132 Neb. 624, 273 N.W. 46 (1937), that the failure of the trial court to appoint a guardian ad litem for an allegedly incompetent party in a mortgage foreclosure proceeding “is at most only erroneous and the appropriate remedy is by direct appeal and not by an original action to vacate the judgment.” 132 Neb. at 627, 273 N.W. at 48.

The denial of the motion to vacate was not “untenable or unreasonable or . . . clearly against justice or conscience, reason, and evidence,” see *Talkington v. Womens Servs.*, 256 Neb. 2, 5, 588 N.W.2d 790, 794 (1999), because (1) Denise was represented by counsel throughout the dissolution proceedings, (2) she did not appeal from the decree, and (3) the record does not show that her interests were adversely affected by the fact that a guardian ad litem was not appointed. The district court did not abuse its discretion in denying the motion to vacate, and we therefore affirm.

AFFIRMED.

TERRENCE L. KUBICEK ET AL., APPELLANTS, V.
CITY OF LINCOLN, NEBRASKA, ET AL., APPELLEES.

658 N.W.2d 291

Filed March 21, 2003. No. S-01-1036.

1. **Summary Judgment: Appeal and Error.** In reviewing an order granting a motion for summary judgment, the question is not how a factual issue is to be decided, but, instead, whether any real issue of material fact exists.
2. ____: _____. In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Judgments: Appeal and Error.** Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.
4. **Municipal Corporations: Statutes.** A provision of a home rule charter takes precedence over a conflicting state statute in instances of local municipal concern.
5. **Municipal Corporations.** A charter defining powers and duties is essential to the creation and existence of a municipal corporation.
6. _____. While legislative charters are always grants of power that are strictly construed, home rule or constitutional charters may be either grants of power or limitations of power.
7. **Municipal Corporations: Ordinances: Words and Phrases.** A resolution is generally not the equivalent of an ordinance, but is rather an act of a temporary character; is ordinarily sufficient for council action on ministerial, administrative, or executive matters; and does not rise to the dignity of an ordinance.
8. ____: ____: _____. If an ordinance enacts a law or lays down a course of policy to guide the citizens, there can be no question that it is legislative in character; but if

it serves simply to put into execution previously enacted laws, it is clearly executive or administrative in nature.

9. ____: ____: _____. The crucial test for determining that which is legislative (ordinance) from that which is administrative or executive (resolution) is whether the action taken was one making a law, or executing or administering a law already in existence.
10. **Municipal Corporations: Initiative and Referendum.** Referendum provisions within the Nebraska statutes apply to legislative acts, but not to administrative or executive matters.
11. ____: _____. The right to referendum on a measure passed by a municipal council is ordinarily confined to those acts of the council which are in the exercise of its legislative power and does not extend to administrative or executive acts, even though such acts are exercised by resolution or ordinance.
12. ____: _____. It is fundamental that to permit a referendum to be invoked to annul or delay executive or administrative action would be to destroy the efficiency of the business affairs of a municipality.
13. **Statutes.** It is not within the province of the courts to read a meaning into a statute that is not there.
14. **Appeal and Error.** An appellate court will not consider an issue on appeal that is not presented to or passed upon by the trial court.

Appeal from the District Court for Lancaster County: KAREN FLOWERS, Judge. Affirmed.

Terrence L. Kubicek, pro se, and for appellants.

Dana W. Roper, Lincoln City Attorney, and Joel D. Pedersen for appellee City of Lincoln.

Richard R. Wood for appellee Board of Regents of the University of Nebraska.

Steven G. Seglin for appellee Lower Platte South Natural Resources District.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, McCORMACK, and MILLER-LERMAN, JJ.

McCORMACK, J.

NATURE OF CASE

Appellants, Terrence L. Kubicek; Homestead Reliance, Inc.; Malone Neighborhood Association, Inc.; and One Community Alliance, filed this suit seeking a preliminary injunction, declaratory relief, and a writ of mandamus against appellees, the City of

Lincoln, Nebraska; Board of Regents of the University of Nebraska; and the Lower Platte South Natural Resources District. Appellants challenge the Lincoln City Council's creation and participation in the Joint Antelope Valley Authority (JAVA). Appellants and appellees both filed motions for summary judgment. The district court granted appellees' motion. Appellants filed this appeal. We moved the case to our docket pursuant to our statutory authority. We conclude that the city properly entered into JAVA, pursuant to an interlocal agreement, as permitted by state statute and the city charter. Therefore, we affirm the order of the district court.

BACKGROUND

The material facts are not in dispute. Both Neb. Const. art. XV, § 18, and the Interlocal Cooperation Act (ICA), Neb. Rev. Stat. § 13-801 et seq. (Reissue 1997), permit subdivisions and governments in the State of Nebraska to cooperate with one another for the purpose of jointly exercising governmental authority and responsibilities. Furthermore, the Lincoln City Charter, art. II, § 5 (1992) (political subdivision provision) permits the city to enter into interlocal agreements with other political subdivisions. In 2000, appellees formed JAVA by entering into an interlocal cooperation agreement. The Lincoln City Council approved and authorized the city's participation in JAVA by resolution, without first seeking voter approval.

JAVA is an administrative entity created and empowered to implement the Antelope Valley Project (project). JAVA is composed of three partners—appellees. JAVA's business affairs are conducted by an administrative board composed of one representative for each partner. Each member of the administrative board has one vote, and JAVA may take action only upon the unanimous vote of the board. The project generally includes community revitalization, transportation, and drainage-flood control improvements along the Antelope Creek. JAVA was formed in order to create a joint entity that could properly address, in a timely and coordinated fashion, all the issues and detailed decisions needed to be made on the interrelated and multijurisdictional aspects of the project over a multiyear timeframe. Before the creation of JAVA, each partner had the statutory

authority to implement certain aspects of the project. Together, through JAVA, the three partners have complete statutory authority to implement the whole project.

According to the interlocal cooperation agreement, the project has two components: "Phase One" is the preparation period, and "Phase Two" is the implementation period. The preparation period was to commence in the spring of 2000 and take approximately 6 to 24 months to complete, followed by the implementation period which is estimated to take 6 to 10 years to complete. During the implementation period, each partner is to transfer to JAVA, or the city, the necessary property interest to enable JAVA to carry out its responsibilities. After completion of the project, JAVA is to transfer all real estate and improvements thereon to the appropriate individual partner. At such time, the operation, maintenance, repairs, and inspection will be the sole responsibility of each individual partner. The project's estimated financial plan includes federal, state, city, and private funding. JAVA's enumerated powers, as set forth in the interlocal cooperation agreement, include, but are not limited to, the following: the power to receive gifts, grants, bequests, devises, exchanges, and appropriations; to contract; to acquire property, including by condemnation if necessary; to relocate residences, buildings, and structures; to lease or purchase material and equipment; to borrow, mortgage, pledge, or secure loans; to construct; to bond its appropriated revenue and assets; and to sue and be sued.

Appellants appeared before the city council, challenging the legality of JAVA absent an enabling plebiscite by the electorate. Appellants requested that the matter be subject to voter approval. Appellants' request was based on their interpretation of the Lincoln City Charter, art. IV, § 25 (1966) (department provision). The city council denied appellants' request for a vote by the electorate. Thereafter, in January 2001, appellants filed for a preliminary injunction, declaratory relief, and writ of mandamus in the district court. Appellants' motion for a preliminary injunction was denied by the district court. In March, both appellants and appellees filed motions for summary judgment. In granting appellees' motion, the district court determined that the department provision of the city charter did not apply to the city's authority to enter into interlocal agreements. The court held that

the city's authority to form interlocal agreements was found exclusively in the political subdivision provision of the city charter and that no further vote of the electorate was necessary.

ASSIGNMENTS OF ERROR

The essence of appellants' argument is whether the city has the authority to form or participate in a new authority, JAVA, through an interlocal agreement without first obtaining voter approval. Specifically, appellants assign, consolidated and rephrased, that the district court erred in (1) granting summary judgment in favor of appellees, while denying appellants' motion for summary judgment; (2) failing to enjoin the city from participating in JAVA pending a plebiscite per the city charter; (3) failing to issue a writ of mandamus ordering the city to conduct an election regarding the city's participation in JAVA; (4) denying appellants' motion to join JAVA as a necessary party; (5) denying appellants' motion for declaratory judgment based on the facts of the case and issues of law; (6) joining the Board of Regents of the University of Nebraska and the Lower Platte South Natural Resources District as necessary parties; (7) failing to disclose the fact that the judge's spouse is a faculty member at the University of Nebraska; (8) ignoring the issue of whether the city council's action authorizing creation of and participation in JAVA by resolution rather than by ordinance is a lawful exercise of power delegated to a home rule city; (9) applying the ICA, which is permissive and subject to local procedural requirements, as not subject to the procedural requirements of the city charter requiring a plebiscite as a condition precedent when the city council creates a department, board, agency, or authority; (10) subrogating the superior reservation of the power of a plebiscite by the electorate expressed in the city charter to later provisions that merely enabled the city to pursue interlocal agreements; and (11) failing to award appellants costs and reasonable attorney fees.

STANDARD OF REVIEW

[1,2] In reviewing an order granting a motion for summary judgment, the question is not how a factual issue is to be decided, but, instead, whether any real issue of material fact exists. *Shlien v. Board of Regents*, 263 Neb. 465, 640 N.W.2d 643 (2002); *Bates v. Design of the Times, Inc.*, 261 Neb. 332, 622 N.W.2d 684

(2001). In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Reinke Mfg. Co. v. Hayes*, 256 Neb. 442, 590 N.W.2d 380 (1999); *Dvorak v. Bunge Corp.*, 256 Neb. 341, 590 N.W.2d 682 (1999).

[3] Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court. *In re Application of Neb. Pub. Serv. Comm.*, 260 Neb. 780, 619 N.W.2d 809 (2000).

ANALYSIS

The main issue in this case, as asserted by appellants, is whether the city can form a new authority, JAVA, through an interlocal agreement without a vote of the electorate. To resolve this issue, we examine the city's statutory authority to join interlocal agreements.

Nebraska permits interlocal agreements pursuant to the ICA. See § 13-801. The ICA's purpose is to permit local governmental units to make the most efficient use of their powers by enabling them to cooperate with other localities on the basis of mutual advantage. See § 13-802. One provision within the act provides:

The provisions of the Interlocal Cooperation Act shall be deemed to provide an additional, alternative, and complete method for the doing of the things authorized by the act and shall be deemed and construed to be supplemental and additional to, and not in derogation of, powers conferred upon political subdivisions, agencies, and others by law. *Insofar as the provisions of the Interlocal Cooperation Act are inconsistent with the provisions of any general or special law, administrative order, or regulation, the provisions of the Interlocal Cooperation Act shall be controlling.*

(Emphasis supplied.) § 13-825.

The city charter also allows for interlocal cooperation as provided by the political subdivision provision, enacted in 1992, which provides:

Sec. 5. Join Other Political Subdivisions. The city shall have the power to join with other political or governmental

subdivisions, agencies, or public corporations, whether federal, state or local, or with any number or combination thereof, by contract or otherwise, as may be permitted by the laws of the State of Nebraska, in the joint ownership, operation, or performance of any property, facility, power or function, or in agreements containing provisions that one or more thereof operate or perform for the other or others.

.....
The provisions of this section shall govern and apply notwithstanding any existing provisions of this charter to the contrary.

(Emphasis supplied.) Lincoln City Charter, art. II, § 5 (1992).

Appellants do not challenge the constitutionality of JAVA or the city's authority to enter into interlocal agreements. Appellants allege only that the department provision of the city charter confers an absolute duty on the city to subject the city's participation in JAVA to a vote of the electorate. In 1966, the department provision of the city charter was enacted, which provision states:

Sec. 25. Assignment of Departmental Duties. In the event that the city is to undertake any new functions or programs, the council, after hearing the recommendation of the mayor, and after a favorable vote of the people where such vote is required by this charter, may by ordinance assign such new functions or programs to established departments, but to the extent that such assignments would not be practicable, the council may create additional departments. Any such additional department shall in all respects be subject to the provisions of this charter.

.....
Administrative boards, commissions, and authorities may be established by ordinance when such are deemed necessary by the council to administer programs and functions, *but no such board, commission or authority which is to be assigned responsibility for the control or management of property, personnel, facilities, equipment or finances shall be established until such action has been approved by a majority vote of the electors.* The provisions of this section requiring a vote shall apply regardless of whether the

establishment of the proposed administrative board, commission, or authority is based on a permissive law of the State of Nebraska, the exercise of the city's home rule powers, or both.

(Emphasis supplied.) Lincoln City Charter, art. IV, § 25 (1966).

[4] In support of their argument, appellants correctly assert that a provision of a home rule charter takes precedence over a conflicting state statute in instances of local municipal concern. See *Omaha Parking Authority v. City of Omaha*, 163 Neb. 97, 77 N.W.2d 862 (1956). Nevertheless, in this case, appellants' assertion is misplaced because the city charter does not conflict with the state statute allowing interlocal agreements. The alleged conflict in this case arises between two city charter provisions, the political subdivision provision and the department provision. Our analysis focuses on the effect of each provision.

LINCOLN CITY CHARTER

[5,6] The city adopted the city charter in 1917, pursuant to Neb. Const. art. XI, § 2. This provision permits a city having a population of more than 5,000 to "frame a charter for its own government, consistent with and subject to the constitution and laws of this state." Neb. Const. art. XI, § 2. A charter defining powers and duties is essential to the creation and existence of a municipal corporation. 2A Eugene McQuillin, *The Law of Municipal Corporations* § 9.01 (3d ed. 1996). While legislative charters are always grants of power that are strictly construed, home rule or constitutional charters may be either grants of power or limitations of power. *Id.*, § 9.08. The current city charter is a limitations of power charter, not a grant of powers charter. See *In re Application of Lincoln Electric System*, ante p. 70, 655 N.W.2d 363 (2003).

In 1966, the city charter was amended by a majority vote of the electorate to include the department provision, which applies "[i]n the event that the city is to undertake any new functions" Lincoln City Charter, art. IV, § 25 (1966). The provision requires a vote of the electorate when the city council establishes by *ordinance* administrative boards, commissions, and authorities who are to be assigned responsibility for the control or management of property, personnel, facilities, equipment, or finances.

In 1992, the people of the city once again amended the city charter to include the political subdivision provision. This provision allows the city to join with other political subdivisions by contract or otherwise, in the joint ownership, operation, or performance of any property, facility, power, or function. The provision is silent as to requiring a vote of the electorate before the city can join with other political subdivisions.

Appellants allege that JAVA is a new authority as defined by the department provision of the city charter and that thus, voter approval is required. Appellants also allege that the city's approval of JAVA by resolution delegated significant legislative powers that may be delegated and exercised only by ordinance pursuant to state law and the city charter. Appellees, on the other hand, contend that the city's participation in JAVA is exclusively authorized pursuant to the political subdivision provision and that JAVA was properly entered into by resolution because the interlocal agreement was administrative in nature. We agree with appellees.

[7-9] An ordinance is distinguishable from a resolution. The term *ordinance* is generally used to designate a local law of a municipal corporation, duly enacted by the proper authorities, prescribing general, uniform, and permanent rules of conduct, relating to the corporate affairs of the municipality. 5 Eugene McQuillin, *The Law of Municipal Corporations* § 15.01 (3d ed. 1996). A resolution is generally not the equivalent of an ordinance, but is rather an act of a temporary character; is ordinarily sufficient for council action on ministerial, administrative, or executive matters; and does not rise to the dignity of an ordinance. Charles S. Rhyne, *The Law of Local Government Operations* § 8.1 (1980 & Supp. 1985). *Sommerfeld v. City of Seward*, 221 Neb. 76, 375 N.W.2d 129 (1985). If an ordinance enacts a law or lays down a course of policy to guide the citizens, there can be no question that it is legislative in character; but if it serves simply to put into execution previously enacted laws, it is clearly executive or administrative in nature. *State ex rel. Ballantyne v. Leeman*, 149 Neb. 847, 32 N.W.2d 918 (1948). As appellants concede, “[t]he crucial test for determining that which is legislative [ordinance] from that which is administrative or executive [resolution] is whether the action taken was

one making a law, or executing or administering a law already in existence.” *Kelley v. John*, 162 Neb. 319, 321, 75 N.W.2d 713, 715 (1956); *State ex rel. Ballantyne v. Leeman*, *supra*; *State ex rel. Nelson v. Butler*, 145 Neb. 638, 17 N.W.2d 683 (1945); *Read v. City of Scottsbluff*, 139 Neb. 418, 297 N.W. 669 (1941).

For the following reasons, we conclude that the city’s participation in and formation of JAVA through an interlocal cooperation agreement was administrative in nature and not a legislative act. JAVA is a joint administrative entity consistent with the ICA and the political subdivision provision of the city charter. JAVA cannot be a “new” city function or program or an exclusive city department, board, or commission, as defined by the department provision. The agreement combines three governmental entities: a state agency, a municipal corporation, and a political subdivision in an effort to manage existing statutory authority under one organizing body. Each partner maintains some independent responsibility to contribute its fair share of the funds, assets, and administrative services throughout the agreement. Furthermore, JAVA is a temporary entity inconsistent with the ordinance requirement in the department provision. The project’s duration purports to last no more than 12 years. At the completion of the project, JAVA will terminate and each individual partner will be responsible for its own property. Therefore, the city correctly authorized its participation in JAVA by resolution and not by an ordinance.

[10-12] The distinction between a resolution and an ordinance in referendum actions is useful in arriving at the correct determination of this case. It is the rule in our state that the referendum provisions within our statutes apply to legislative acts, but not to administrative or executive matters. *Kelley v. John*, *supra*. The right to referendum on a measure passed by a municipal council is ordinarily confined to those acts of the council which are in the exercise of its legislative power and does not extend to administrative or executive acts, even though such acts are exercised by resolution or ordinance. *State ex rel. Ballantyne v. Leeman*, *supra*. It is fundamental that to permit a referendum to be invoked to annul or delay executive or administrative action would be to destroy the efficiency of the business affairs of a municipality. *State ex rel. Ballantyne v. Leeman*, *supra*; *Read v. City of Scottsbluff*, *supra*.

In *State ex rel. Ballantyne v. Leeman*, 149 Neb. 847, 32 N.W.2d 918 (1948), the Omaha City Charter was amended by majority vote to direct the city council to issue municipal bonds for the purpose of acquiring land for the construction of a municipal auditorium. Subsequent to the amendment, the city council by ordinance selected a site for the publicly owned auditorium. The appellants, in a mandamus proceeding, sought to compel the city council to submit the selection site to a referendum vote. We held that it was an act of legislation to direct and authorize the construction of a public building, but that the selection of the site was administrative in nature and thus not subject to referendum actions. *Id.* We stated that to permit such a referendum would delay executive conduct of the council. *Id.*

In the case at bar, the city charter was amended by a vote of the electorate to permit the city council to join with other political subdivisions or public corporations for joint ownership, operation, or performance of any power or function. It is now contended in this appeal that another vote of the electorate is required before the city council can join with other entities in the formation of JAVA. We disagree. Amending the city charter to include the political subdivision provision which permits interlocal cooperation agreements was clearly a legislative act and thus subject to voter approval. However, executing an agreement pursuant to the political subdivision provision is administrative in nature and thus not subject to voter approval. The city council, in joining JAVA, is simply putting into effect the political subdivision provision. To require a separate vote of the electorate each time the city council chooses to undertake a joint effort would clearly delay administrative action already approved of by the electorate in adopting the political subdivision provision. Such delay would destroy the efficiency of the business affairs of a municipality that we disapproved of in *State ex rel. Ballantyne v. Leeman*, *supra*.

[13] Furthermore, the political subdivision provision provides that "this section shall govern and apply notwithstanding any existing provisions of this charter to the contrary." We determine that the political subdivision provision of the city charter provides the exclusive authority for the city to enter into interlocal agreements and that the department provision is not controlling. The political subdivision provision does not require voter

approval before the city council can act. The city, when adopting the political subdivision provision, could have included a requirement of voter approval if that was its intention. It is not within the province of the courts to read a meaning into a statute that is not there. *Shaul v. Lang*, 263 Neb. 499, 640 N.W.2d 668 (2002); *Creighton St. Joseph Hosp. v. Tax Eq. & Rev. Comm.*, 260 Neb. 905, 620 N.W.2d 90 (2000); *Ramsey v. State*, 259 Neb. 176, 609 N.W.2d 18 (2000). Therefore, we refuse to write in such requirement when the electorate, who had the opportunity to provide for voter approval, did not do so. Therefore, we affirm the district court's decision to grant appellees' motion for summary judgment.

[14] The assignment of error we now address is that the district court erred in not disclosing the relationship of the judge's spouse as a faculty member of the University of Nebraska. Our review of the record does not disclose any allegation of this sort, nor does it disclose an appellants' motion for the judge to recuse herself. An appellate court will not consider an issue on appeal that is not presented to or passed upon by the trial court. *Maxwell v. Montey*, 262 Neb. 160, 631 N.W.2d 455 (2001); *Claypool v. Hibberd*, 261 Neb. 818, 626 N.W.2d 539 (2001).

Finally, we note that we have considered all other assignments of error not specifically addressed in this opinion and find them to be without merit.

CONCLUSION

We conclude that the city properly entered into JAVA, an interlocal agreement, as permitted by state statute and the city charter. We also conclude that the formation of JAVA was administrative in nature and not subject to voter approval. For the above-stated reasons, we affirm the district court's decision to grant appellees' motion for summary judgment.

AFFIRMED.

STEPHAN, J., not participating.

BORLEY STORAGE AND TRANSFER CO., INC., APPELLEE, v.
WARREN R. WHITTED, JR., APPELLANT.

657 N.W.2d 911

Filed March 21, 2003. No. S-01-1139.

1. **Summary Judgment.** Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Rules of the Supreme Court: Records: Waiver.** The official court reporter shall in all instances make a verbatim record of the evidence offered at trial or other evidentiary proceeding, including but not limited to objections to any evidence and rulings thereon, oral motions, and stipulations by the parties. This record may not be waived.
4. **Trial: Records: Waiver.** All evidentiary proceedings require the presence of a court reporter who shall make a verbatim record of the proceedings, and such recording may not be waived by the court or the parties.
5. **Summary Judgment: Records: Appeal and Error.** Affidavits, depositions, and other evidence considered at a hearing on a motion for summary judgment must be preserved in a bill of exceptions filed in the trial court before such evidence can be considered during appellate review of the motion.
6. **Malpractice: Attorney and Client: Negligence: Proof: Proximate Cause: Damages.** In civil legal malpractice actions, a plaintiff alleging attorney negligence must prove three elements: (1) the attorney's employment, (2) the attorney's neglect of a reasonable duty, and (3) that such negligence resulted in and was the proximate cause of loss (damages) to the client.

Appeal from the District Court for Adams County: STEPHEN ILLINGWORTH, Judge. Reversed and vacated, and cause remanded for further proceedings.

Jeffrey H. Jacobsen and Bradley D. Holbrook, of Jacobsen, Orr, Nelson, Wright & Lindstrom, P.C., for appellant.

Daniel L. Aschwege and John H. Marsh, of Knapp, Fangmeyer, Aschwege, Besse & Marsh, P.C., for appellee.

HENDRY, C.J., WRIGHT, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

McCORMACK, J.

NATURE OF CASE

Borley Storage and Transfer Co., Inc. (Borley Storage), brought this malpractice action against Warren R. Whitted, Jr., a licensed attorney in Nebraska. The district court on May 18, 1999, entered partial summary judgment in Borley Storage's favor on the issues of Whitted's employment and his breach of duty. The case proceeded to trial on the issues of proximate causation and damages, and a jury returned a verdict in favor of Borley Storage and against Whitted in the amount of \$90,000. Whitted appeals and assigns various errors at summary judgment and at trial.

BACKGROUND

Given the grounds on which we decide this case, a detailed recitation of the facts is unnecessary.

From 1980 to 1987, Whitted was an attorney in the Hastings, Nebraska, office of the law firm of Fitzgerald, Brown, Leahy, McGill & Strom. During that time, Whitted provided legal services to Borley Storage. In 1982, Borley Storage sold various assets to Borley Moving and Storage (Borley Moving). Whitted drafted several documents to effectuate the sale of the assets, including a purchase agreement, security agreement, and promissory note. In addition, Whitted filed a financing statement with the Nebraska Secretary of State on July 12, 1983, to perfect Borley Storage's security interest in some of the assets sold. It is undisputed that Whitted did not file a continuation statement to continue this financing statement, which expired on July 12, 1988.

In 1990, another creditor of Borley Moving filed a financing statement to perfect a security interest in various assets of Borley Moving. Several years later, Borley Moving filed for bankruptcy. Borley Storage claimed an interest in some of the assets of Borley Moving, but Borley Storage's lien on these assets was found to be a second lien to the other creditor. Because the value of the claim of the other creditor exceeded the value of the underlying collateral, Borley Storage did not receive any equity on its claim.

In September 1991, Borley Storage filed this legal malpractice action against Whitted. Borley Storage's amended petition

alleged, among other things, that Whitted breached the applicable standard of care by failing to continue the July 12, 1983, financing statement and by failing to inform Borley Storage of the need to file a continuation statement. Borley Storage further alleged that, as a result, it was damaged by its loss of its lien priority status. In his answer, Whitted denied the material allegations of Borley Storage's petition.

Both parties filed motions for summary judgment. The district court granted Borley Storage's motion and denied Whitted's motion. The court found as a matter of law that Whitted was employed as an attorney for Borley Storage and that Whitted "failed to perform in accordance with the proper standard of care for protecting a client's security interest." The court also rejected Whitted's argument that the action was barred by the 2-year statute of limitations in Neb. Rev. Stat. § 25-222 (Reissue 1995), finding that the discovery exception applied.

The case proceeded to trial on the issues of proximate causation and damages. The jury returned a verdict in favor of Borley Storage and against Whitted in the amount of \$90,000. Whitted's motion for remitter and motion for new trial or, in the alternative, motion for judgment notwithstanding the verdict were both overruled, and this appeal followed.

ASSIGNMENTS OF ERROR

Whitted assigns that the district court erred in (1) granting Borley Storage's motion for summary judgment on liability; (2) granting Borley Storage's motion for summary judgment on the discovery exception to the statute of limitations; (3) overruling Whitted's motions for directed verdict because Borley Storage's action was premature or, alternatively, because Whitted was not the proximate cause of Borley Storage's alleged loss; (4) overruling Whitted's motion for directed verdict because Borley Storage failed to mitigate its damages; (5) overruling Whitted's motion for directed verdict because the court improperly admitted exhibits 20 through 25 under the business record exception to the hearsay rule; (6) denying Whitted's motion for mistrial; (7) overruling Whitted's motion for remitter and motion for new trial or, alternatively, motion for judgment notwithstanding the verdict because the trial court should have instructed the jury as to

Whitted's affirmative defenses; (8) overruling Whitted's motion for remitter and motion for new trial because Whitted was entitled to a reduction of the judgment for the moneys received by Borley Storage under the bankruptcy plan; and (9) overruling Whitted's motion for new trial because the jury verdict was the result of speculation, guess, or conjecture.

STANDARD OF REVIEW

[1] Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Soukop v. ConAgra, Inc.*, 264 Neb. 1015, 653 N.W.2d 655 (2002).

[2] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Egan v. Stoler*, ante p. 1, 653 N.W.2d 855 (2002).

ANALYSIS

In his first two assignments of error, Whitted argues that the district court erroneously granted partial summary judgment in favor of Borley Storage. Whitted argues that the evidence at the summary judgment hearing created genuine issues of material fact as to whether he owed a duty to Borley Storage and whether he breached that duty.

Before reaching the merits of Whitted's arguments, we must consider the status of the appellate record. The record on appeal contains what purports to be a bill of exceptions from the summary judgment hearing. This "bill of exceptions" is certified by the official court reporter as containing exhibits 1 through 12, offered in evidence on July 7, 1996, and April 24, 1997. Also included is a certificate, signed by the district court judge, certifying that exhibits 1 through 12 were offered by the parties and received in proceedings held on July 2, 1996, and April 24, 1997. This certificate further indicates that no court reporter was present at these proceedings, a fact which was confirmed by the parties at oral argument before this court. We also note that the district court's order disposing of the parties' summary judgment

motions, which is included in the transcript, states that “[e]xhibits one (1) through twelve (12) were received” and that the summary judgment hearing occurred on December 23, 1998. From our review of the record, we are unable to determine what proceedings took place on July 2 and 7, 1996, or April 24, 1997.

[3,4] Pursuant to Neb. Ct. R. of Prac. 5A(1) (rev. 2000), “[t]he official court reporter shall in all instances make a *verbatim record* of the evidence offered at trial or other evidentiary proceeding, including but not limited to objections to any evidence and rulings thereon, oral motions, and stipulations by the parties. This record may not be waived.” (Emphasis supplied.) All evidentiary proceedings require the presence of a court reporter who shall make a verbatim record of the proceedings, and such recording may not be waived by the court or the parties. *Hogan v. Garden County*, 264 Neb. 115, 646 N.W.2d 257 (2002).

The record in this case does not include a verbatim record of the proceedings. Without a valid bill of exceptions conforming to our rules, an appellate court cannot determine which exhibits were offered by each party, whether any party objected to any of the exhibits, how the trial court may have ruled on any objections, or which exhibits were ultimately received into evidence. If, for whatever reason, a court reporter cannot be present at an evidentiary proceeding, another reporter should be obtained or the proceeding should be postponed until a court reporter can be present. As we made clear in *Presle v. Presle*, 262 Neb. 729, 634 N.W.2d 785 (2001), we will not permit evidentiary proceedings to occur without the presence of a court reporter to record the proceedings.

[5] Affidavits, depositions, and other evidence considered at a hearing on a motion for summary judgment must be preserved in a bill of exceptions filed in the trial court before such evidence can be considered during appellate review of the motion. *Morrison Enters. v. Aetna Cas. & Surety Co.*, 260 Neb. 634, 619 N.W.2d 432 (2000). Without a proper bill of exceptions of the summary judgment proceeding before us, our review of the summary judgment is limited to the pleadings.

[6] Generally, in civil legal malpractice actions, a plaintiff alleging attorney negligence must prove three elements: (1) the attorney’s employment, (2) the attorney’s neglect of a reasonable duty, and (3) that such negligence resulted in and was the

proximate cause of loss (damages) to the client. *Rodriguez v. Nielsen*, 264 Neb. 558, 650 N.W.2d 237 (2002). These elements are the same general elements required in any other case based on negligence, i.e., duty, breach, proximate cause, and damages. *Stansbery v. Schroeder*, 226 Neb. 492, 412 N.W.2d 447 (1987).

Whitted's second amended answer admits that Whitted performed legal services for Borley Storage concerning the sale of the business. The district court correctly concluded on summary judgment that there were no genuine issues of material fact as to Whitted's employment as an attorney for Borley Storage. However, Whitted denied the remaining allegations of Borley Storage's amended petition, including whether he breached any duty owed to Borley Storage. Thus, genuine issues of material fact exist to preclude the district court's conclusion that Whitted "failed to perform in accordance with the proper standard of care." The district court erred in granting partial summary judgment in favor of Borley Storage. Without a finding that Whitted breached any duty owed to Borley Storage, we decline to consider Whitted's remaining assignments of error.

CONCLUSION

In this case, no court reporter was present to record the summary judgment proceedings. Without a valid bill of exceptions to preserve the evidence presented at summary judgment, our review is limited to the pleadings, which reveal genuine issues of material fact on the issue of breach of duty. Therefore, we vacate the judgment entered by the court in favor of Borley Storage and reverse the district court's order granting partial summary judgment in Borley Storage's favor. The cause is remanded for further proceedings.

REVERSED AND VACATED, AND CAUSE REMANDED
FOR FURTHER PROCEEDINGS.

CONNOLLY, J., not participating.

LANCE D. BAILEY, APPELLEE, v. LUND-ROSS CONSTRUCTORS CO.,
A NEBRASKA CORPORATION, APPELLANT, AND MERRIMAC STONE
CO., A NEW HAMPSHIRE CORPORATION, APPELLEE.

657 N.W.2d 916

Filed March 21, 2003. No. S-02-174.

1. **Jurisdiction: Appeal and Error.** It is the power and duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties.
2. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.
3. **Final Orders.** Since Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2002) is substantially similar to Fed. R. Civ. P. 54(b), federal cases construing rule 54(b) may be used for guidance in determining when a decision is a “final judgment” for purposes of § 25-1315(1).
4. **Final Orders: Words and Phrases.** The term “final judgment” as used in Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2002) is the functional equivalent of a “final order” within the meaning of Neb. Rev. Stat. § 25-1902 (Reissue 1995).
5. **Actions: Parties: Final Orders: Appeal and Error.** With the enactment of Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2002), one may bring an appeal pursuant to such section only when (1) multiple causes of action or multiple parties are present, (2) the court enters a final order within the meaning of Neb. Rev. Stat. § 25-1902 (Reissue 1995) as to one or more but fewer than all of the causes of action or parties, and (3) the trial court expressly directs the entry of such final order and expressly determines that there is no just reason for delay of an immediate appeal.
6. **Final Orders: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 25-1902 (Reissue 1995), an order is final for purposes of appeal if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on summary application in an action after judgment is rendered.
7. **Statutes: Words and Phrases.** A special proceeding means civil statutory remedies not encompassed in chapter 25 of the Nebraska Revised Statutes.
8. **Pleadings: Final Orders.** An order overruling a motion for leave to amend a petition to assert a new cause of action is not a final, appealable order.
9. ____: _____. An order denying a motion for leave to assert a cross-claim is not a final, appealable order.

Appeal from the District Court for Douglas County: GERALD E. MORAN, Judge. Appeal dismissed.

Thomas A. Grennan and Francie C. Riedmann, of Gross & Welch, P.C., for appellant.

Michael F. Scahill and James D. Garriott, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee Merrimac Stone Co.

William E. Gast, P.C., L.L.O., and James E. Bachman for appellee Lance D. Bailey.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, McCORMACK, and MILLER-LERMAN, JJ.

HENDRY, C.J.

INTRODUCTION

Lund-Ross Constructors Co. (Lund-Ross) appeals the district court's order overruling its motion for leave to file a cross-claim against Merrimac Stone Co. (Merrimac). Lund-Ross sought to assert a cross-claim against Merrimac to proportionately diminish its liability to Lance D. Bailey, if any, by the percentage of contributory negligence attributable to Merrimac pursuant to Neb. Rev. Stat. § 25-21,185.10 (Reissue 1995). Lund-Ross appealed after the district court entered a "final judgment" pursuant to Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2002). We moved the case to our docket pursuant to our authority to regulate the caseloads of this court and the Nebraska Court of Appeals. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

FACTUAL BACKGROUND

Bailey filed a petition naming both Lund-Ross and Merrimac as defendants. In his petition, Bailey alleged that Lund-Ross, as the general contractor of a building under construction in Omaha, Nebraska, entered into a contract with Merrimac to "perform, as sub-contractor, certain stone masonry services in connection with the construction of the aforementioned building." Bailey further alleged that in August 2000, he was employed by Merrimac and, during the course of his employment, assisted in placing stone masonry on the side of the building under construction while on scaffolding approximately 40 feet above ground level. Bailey asserted that as a direct and proximate result of Lund-Ross' negligent failure to safely construct and monitor the scaffolding, the scaffolding collapsed, causing him to fall and sustain injuries.

Bailey named Merrimac as a defendant "solely for the purpose of determining [Merrimac's] subrogation rights under the

Nebraska Workers' Compensation Law." Bailey prayed for both a determination of Merrimac's "rights and liabilities under the Workers' Compensation Act" and for a judgment against Lund-Ross for general and special damages.

Merrimac filed an answer in which it admitted all the allegations contained in Bailey's petition. Merrimac additionally alleged that it had paid workers' compensation benefits in the amount of \$2,675 to Bailey for the injury Bailey suffered during the course of his employment with Merrimac. Merrimac asserted that pursuant to Neb. Rev. Stat. § 48-118 (Cum. Supp. 2002), it was entitled to recover from Lund-Ross "its workers' compensation subrogation interest" in the amount of \$2,675.

Lund-Ross filed an answer admitting that it had entered into a contract with Merrimac to perform stone masonry services and that Bailey "fell from scaffolding" and "sustained some injuries" while working for Merrimac on the building under construction. Lund-Ross denied that its negligence either caused the scaffolding to collapse or caused Bailey to suffer injuries. Additionally, Lund-Ross alleged as an affirmative defense, *inter alia*, that Bailey was contributorily negligent in a percentage sufficient to bar his recovery. Lund-Ross prayed that Bailey's petition be dismissed.

After filing its answer, Lund-Ross filed an amended motion for leave to file a cross-claim against Merrimac on the following grounds: "1. [Lund-Ross] is entitled to a determination by the jury of the relative negligence or fault of Merrimack [sic] Stone Company; and 2. Evidence as to the negligence of Merrimack [sic] Stone will come into evidence, in any event, as to the issue of proximate causation." Lund-Ross attached a proposed cross-claim to its amended motion alleging that its liability to Bailey, if any, should be reduced by the extent of contributory negligence apportioned to Merrimac pursuant to § 25-21,185.10.

In an order dated January 9, 2002, the district court overruled Lund-Ross' amended motion for leave to file its proposed cross-claim. In response, Lund-Ross filed a "Motion for Determination of Final Judgment," in which it requested the court to determine that (1) the January 9 order overruling Lund-Ross' motion for leave to file a cross-claim was a final judgment and (2) there was

no just reason for delay of the entry of judgment so that Lund-Ross could immediately pursue an appeal.

In a February 5, 2002, order, the court granted Lund-Ross' motion. The court determined with respect to its January 9 order that

pursuant to Neb. Rev. Stat. § 25-1315 . . . there is no just reason for delay of such final judgment and [the court] hereby expressly directs the entry of a final judgment denying Defendant's Amended Motion for Leave to File a Cross-Claim against Defendant Merrimac Stone Company and related entities. . . .

. . . [T]he issues presented by the proposed Cross-Claim are issues that affect a substantial right of Defendant Lund-Ross Constructors Co.

Lund-Ross appeals the district court's denial of its motion for leave to file its proposed cross-claim.

ASSIGNMENTS OF ERROR

Lund-Ross assigns that the district court erred in (1) overruling its amended motion for leave to file a cross-claim; (2) "ruling that a cross-claim against [Bailey's] employer, in order to permit the trier of fact to apportion negligence pursuant to Neb. Rev. Stat. § 25-21,185.07 et seq., would violate the 'exclusivity provision' of Neb. Rev. Stat. § 48-148"; and (3) "finding that the negligent employer's subrogation claim could not be reduced by its percentage of negligence."

STANDARD OF REVIEW

A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law. *Slaymaker v. Breyer*, 258 Neb. 942, 607 N.W.2d 506 (2000); *In re Application of SID No. 384*, 256 Neb. 299, 589 N.W.2d 542 (1999).

ANALYSIS

[1,2] Before reaching the assignments of error asserted by Lund-Ross, this court must first determine whether it has jurisdiction. It is the power and duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties. *Vopalka v.*

Abraham, 260 Neb. 737, 619 N.W.2d 594 (2000). For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders. *In re Interest of Anthony R. et al.*, 264 Neb. 699, 651 N.W.2d 231 (2002); *Larsen v. D B Feedyards*, 264 Neb. 483, 648 N.W.2d 306 (2002).

The appeal of the district court's order denying Lund-Ross' motion for leave to amend was brought pursuant to § 25-1315(1), after the district court determined that "there is no just reason for delay of such final judgment." Explaining such determination, the court stated:

By ruling that the Order [dated] January 9, 2002, is a final judgment, the Court states that the issues presented by the proposed Cross-Claim are issues that affect a substantial right of Defendant Lund-Ross Constructors Co. Specifically, Defendant Lund-Ross Constructors Co. seeks to have the alleged negligence of Merrimac Stone Company considered by the jury for purposes of apportionment and, among other things, defeating the subrogation claim of Merrimac for workers' compensation benefits. This Court notes that, if the Nebraska Court of Appeals or the Nebraska Supreme Court were to ultimately reverse this Court's ruling denying the filing of the Cross-Claim after a trial on the merits, the case could ultimately be tried twice. This Court believes that it is in the best interest of judicial economy to declare the Order overruling the Motion for Leave to File Cross-Claim as a final order to allow an appeal to be taken forthwith by Defendant Lund-Ross Constructors Co.

The jurisdictional issue presented is whether § 25-1315(1) permits an immediate appeal of an order denying a motion for leave to assert a cross-claim.

Section 25-1315(1) provides:

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only

upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

In *Keef v. State*, 262 Neb. 622, 627, 634 N.W.2d 751, 757 (2001), this court determined that “a ‘claim for relief’ within the meaning of § 25-1315(1) is equivalent to a separate cause of action, as opposed to a separate theory of recovery.” Thus, “§ 25-1315(1) is implicated only where multiple causes of action are presented or multiple parties are involved” and the trial court expressly directs the entry of a final judgment as to one cause of action or party and expressly determines that there is no just reason for delay of an immediate appeal. 262 Neb. at 629, 634 N.W.2d at 758. See, also, *Scottsdale Ins. Co. v. City of Lincoln*, 260 Neb. 372, 617 N.W.2d 806 (2000); *Chief Indus. v. Great Northern Ins. Co.*, 259 Neb. 771, 612 N.W.2d 225 (2000).

[3] In the instant case, Bailey’s petition named both Lund-Ross and Merrimac as defendants. Thus, “multiple parties are involved.” See § 25-1315(1). However, even though we have multiple parties, § 25-1315(1) still requires the entry of a “final judgment” before a party can utilize § 25-1315(1) to initiate an immediate appeal. See *Keef, supra*. This court has not had occasion to discuss when a decision is a “final judgment” for purposes of § 25-1315(1). See, *Keef, supra*; *Scottsdale Ins. Co., supra*; *Chief Indus., supra*. Since § 25-1315(1) is substantially similar to Fed. R. Civ. P. 54(b), we will look to federal cases construing rule 54(b) for guidance. See *Gernstein v. Lake*, 259 Neb. 479, 610 N.W.2d 714 (2000).

In an action involving either multiple claims or multiple parties, rule 54(b) permits a federal district court to enter a judgment as to fewer than all parties or claims, and such judgment is immediately appealable even though the action may continue as to the other parties or claims. 19 James Wm. Moore et al., Moore’s

Federal Practice § 202.06[1] (3d ed. 2002). The purpose of rule 54(b) is

“to facilitate the entry of an order of final judgment in a multi-claim/multi-party action where the parties [demonstrate] a need for making review available on some of the claims or parties before entry of final judgment as to all The advent of the relaxed joinder provisions in the Federal Rules of Civil Procedure made necessary a revision of what could be considered a ‘judicial unit’ for purposes of appellate jurisdiction. Sound judicial administration warrants allowing appeal on some claims or parties before the entire case is finally adjudicated, but it does not warrant blurring the concept of finality as to a single claim or as to one party Rule 54(b) therefore does not countenance piecemeal review of a claim. . . .”

Soliday v. Miami County, Ohio, 55 F.3d 1158, 1163 (6th Cir. 1995) (quoting *COMPACT v. Metro. Gov. of Nashville & Davidson Co.*, 786 F.2d 227 (6th Cir. 1986)). A similar purpose is served by § 25-1315(1) in view of Nebraska’s liberal joinder rules. See, e.g., Neb. Rev. Stat. §§ 25-311, 25-320, 25-701, and 25-705 (Cum. Supp. 2002).

Rule 54(b), however, does not dispense with the requirement of finality. Federal courts of appeals have jurisdiction of appeals from “final decisions” of federal district courts, 28 U.S.C. § 1291 (2000), and “Rule 54(b) does not and cannot relax in any way the statutory requirement of finality . . . ,” 10 James Wm. Moore et al., *supra*, § 54.28[1] at 54-102. Thus, a federal court of appeals is not vested with jurisdiction over a decision that is not final within the meaning of 28 U.S.C. § 1291 by virtue of a rule 54(b) certification:

“If the district court enters judgment on something less than a final disposition of an entire claim, the Rule 54(b) judgment is improper, and the court of appeals is without jurisdiction to hear the appeal. Such a non-final ruling is an inherently interlocutory order that may not be made appealable under Rule 54(b).” 10 James Wm. Moore et al., *Moore’s Federal Practice* § 54.22[2][a][i], at 54-43 (3d ed. 1998). Such a ruling may not be certified “regardless of whether the district court makes the requisite express

determination that there is no just cause for delay.” 19 *id.* § 202.06[2], at 202-23.

Information Resources v. Dun and Bradstreet, 294 F.3d 447, 451-52 (2d Cir. 2002).

The requirement of finality is the second of three requirements for an appeal of a judgment as to fewer than all parties or claims pursuant to rule 54(b). To bring an appeal pursuant to rule 54(b):

“(1) [M]ultiple *claims* or multiple *parties* must be present, (2) at least one claim, or the rights and liabilities of at least one party, must be finally decided within the meaning of 28 U.S.C. § 1291, and (3) the district court must make ‘an express determination that there is no just reason for delay’ and expressly direct the clerk to enter judgment.”

Information Resources, 294 F.3d at 451. The standards of review applicable to these three requirements are as follows:

Because “[f]actors (1) and (2) address the issue of whether rule 54(b) applies at all to the circumstances of the case,” they are reviewed *de novo*. . . . “Factor (3), on the other hand, is addressed to the ultimate decision to direct the entry of judgment; given the permissive nature of rule 54(b) . . . , this decision is left to the sound judicial discretion of the district court and is to be exercised in the interest of sound judicial administration.”

(Citation omitted.) *Information Resources*, 294 F.3d at 451 (quoting *Ginett v. Computer Task Group, Inc.*, 962 F.2d 1085 (2d Cir. 1992)).

[4,5] We find the foregoing cases construing rule 54(b) persuasive. Rule 54(b) did not remove the jurisdictional requirement of finality within the meaning of 28 U.S.C. § 1291. See, *Information Resources*, *supra*; 10 James Wm. Moore et al., *supra*, § 54.28[1]. We therefore determine that for purposes of Nebraska law, the term “final judgment” as used in § 25-1315(1) is the functional equivalent of a “final order” within the meaning of Neb. Rev. Stat. § 25-1902 (Reissue 1995). Thus, a “final order” is a prerequisite to an appellate court’s obtaining jurisdiction of an appeal initiated pursuant to § 25-1315(1). *Keef v. State*, 262 Neb. 622, 634 N.W.2d 751 (2001); *Tess v. Lawyers Title Ins. Corp.*, 251 Neb. 501, 557 N.W.2d 696 (1997). With the

enactment of § 25-1315(1), one may bring an appeal pursuant to such section only when (1) multiple causes of action or multiple parties are present, (2) the court enters a “final order” within the meaning of § 25-1902 as to one or more but fewer than all of the causes of action or parties, and (3) the trial court expressly directs the entry of such final order and expressly determines that there is no just reason for delay of an immediate appeal. See, *Information Resources*, *supra*; *Keef*, *supra*.

[6,7] Since multiple parties are present in the instant case, the issue before us is whether the district court’s order denying Lund-Ross’ motion for leave to assert a cross-claim against Merrimac is a final order within the meaning of § 25-1902. Pursuant to § 25-1902, an order is final for purposes of appeal if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on summary application in an action after judgment is rendered. *Keef*, *supra*. This case does not fit within the third category because no judgment had been entered when the motion for leave to file a cross-claim was filed. See *Slaymaker v. Breyer*, 258 Neb. 942, 607 N.W.2d 506 (2000). Neither does it fall within the second category of final orders because a “special proceeding” means civil statutory remedies not encompassed in chapter 25 of the Nebraska Revised Statutes. See Neb. Rev. Stat. § 25-812 (Reissue 1995) (repealed by 2002 Neb. Laws, L.B. 876). Thus, the issue becomes whether Lund-Ross’ motion for leave to assert a cross-claim affects a substantial right and in effect determines the action and prevents a judgment.

[8] This court has held that an order overruling a motion for leave to amend a petition to assert a new cause of action is not a final, appealable order. *Knoell Constr. Co., Inc. v. Hanson*, 208 Neb. 373, 303 N.W.2d 314 (1981). Additionally, in *Slaymaker*, *supra*, this court determined that an order denying leave to amend an answer to assert a third party claim is not a final, appealable order. We stated:

Assuming without deciding that the order potentially affects a substantial right, we conclude that it is not a final, appealable order because it does not determine the action and prevent a judgment. . . . By its nature, the Breyers’ claim against Green Valley [Irrigation, Inc.] is dependent

upon the outcome of Slaymaker's negligence claim against the Breyers, which has yet to be resolved in the trial court. If the Breyers are successful in defending that claim, no issue of indemnity, contribution, or comparative negligence will ever arise. On the other hand, if Slaymaker obtains a final judgment against the Breyers, the Breyers would then have a right to an appeal in which they could obtain review of the order denying them leave to assert the third-party claim against Green Valley. Further action by the trial court is necessary before an appellate court can determine whether the order denying the Breyers leave to commence third-party proceedings affects a substantial right.

Slaymaker, 258 Neb. at 948-49, 607 N.W.2d at 511-12.

[9] Assuming without deciding that the order denying Lund-Ross' motion for leave to assert a cross-claim against Merrimac affects a substantial right, we determine that it is not a final, appealable order because "it does not determine the action and prevent a judgment." See *id.* at 948-49, 607 N.W.2d at 512. It does not "dispose of the whole merits" of the pending negligence claim asserted by Bailey against Lund-Ross. See *id.* at 949, 607 N.W.2d at 512. Lund-Ross' cross-claim seeking apportionment is, similarly to *Slaymaker*, *supra*, "dependent upon the outcome" of Bailey's negligence claim against Lund-Ross, since no issue of apportionment will ever arise if Lund-Ross is successful in defending such claim. On the other hand, if Bailey obtains a final judgment against Lund-Ross, Lund-Ross would then have a right to an appeal, in which it could obtain review of the order denying leave to assert a cross-claim against Merrimac. See *Slaymaker*, *supra*. See, also, *Pyca Industries v. Harrison County Waste Water Mngmt.*, 81 F.3d 1412 (5th Cir. 1996) (determining that district court's denial of motion for leave to amend is not final for purposes of rule 54(b)); *Agretti v. ANR Freight System, Inc.*, 982 F.2d 242, 248 (7th Cir. 1992) (determining that district court's denial of motion to amend answer to include two cross-claims "is not considered a final judgment within the meaning of section 1291, title 28 of the United States Code").

We determine as a matter of law that the instant appeal does not satisfy the requirement of finality necessary to bring an appeal pursuant to § 25-1315(1) and that, as such, we are without

jurisdiction. Having so determined, we need not consider whether the district court abused its discretion by expressly determining that there was no just reason for delay of an immediate appeal of its order denying Lund-Ross' motion for leave to file its cross-claim. See, *Hogan v. Consolidated Rail Corp.*, 961 F.2d 1021 (2d Cir. 1992) (applying rule that even if appeal brought pursuant to rule 54(b) is determined to be final within meaning of 28 U.S.C. § 1291, appeals court still must determine whether district court abused its discretion in determining there was no just reason for delay); *United States General, Inc. v. Albert*, 792 F.2d 678, 681 (7th Cir. 1986) (stating that in determining whether jurisdiction is proper over appeal brought pursuant to rule 54(b), "[i]f we agree with the district court that its decision is final, we must then determine whether that court abused its discretion in certifying the decision as ready for appeal").

CONCLUSION

The court is without jurisdiction over the instant appeal because the order denying Lund-Ross leave to assert a cross-claim against Merrimac is not a final, appealable order. Therefore, the appeal is dismissed.

APPEAL DISMISSED.

ALLIED MUTUAL INSURANCE COMPANY, APPELLEE, v.
UNIVERSAL UNDERWRITERS INSURANCE COMPANY, APPELLANT.

657 N.W.2d 905

Filed March 21, 2003. No. S-02-347.

1. **Insurance: Contracts: Appeal and Error.** The interpretation of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination made by the lower court.
2. **Insurance: Contracts: Motor Vehicles: Liability.** When a conflict exists because automobile insurance policies contain mutually repugnant language intended to restrict or escape liability for a particular risk in the event there exists other insurance, the automobile owner's policy provides primary coverage and the driver's policy provides excess coverage.
3. ____: ____: ____: _____. Where an excess insurance clause in a driver's automobile liability policy and a no-liability clause in the automobile owner's liability

policy apparently conflict, the no-liability clause is ineffective and the driver's insurance is excess.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed.

Tim B. Streff, of Govier, Milone & Streff, L.L.P., and J. Patrick Green, of Creighton Law School, for appellant.

Thomas B. Wood, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

NATURE OF CASE

In this declaratory judgment action, the parties sought a determination as to which of two insurance policies provided coverage for the loss of an automobile that was destroyed by fire. The district court found that Universal Underwriters Insurance Company (Universal), which issued the policy insuring the automobile, provided coverage, and the court entered summary judgment in favor of Allied Mutual Insurance Company (Allied), which insured the driver of the automobile. Universal appeals.

SCOPE OF REVIEW

[1] The interpretation of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination made by the lower court. *Neff Towing Serv. v. United States Fire Ins. Co.*, 264 Neb. 846, 652 N.W.2d 604 (2002).

FACTS

The parties entered into a stipulation of facts which indicates the following: Allied provided automobile insurance coverage to Kevin Hollister, and Universal provided comprehensive property and liability insurance to Kerr Chevrolet (Kerr). In December 1999, Kerr loaned Hollister a 1998 Chevrolet Monte Carlo while his car was being serviced. (We will refer to this service loaner automobile as "the loaner.") The loaner was operated under dealer plates. The loaner was destroyed by fire when Hollister

drove it off the road and grass underneath it ignited. When Kerr sought indemnification for the loss from Allied and/or Universal, a dispute arose between the insurance companies. Allied loaned Kerr \$7,250 to indemnify for the loss of the loaner, as evidenced by a loan receipt. Allied sued Universal seeking subrogation.

In a petition for declaratory judgment filed on September 7, 2000, Allied claimed that the Universal policy provided coverage for the loaner which was primary to the coverage provided by Allied to Hollister, which coverage was “secondary.” Allied alleged that Kerr had demanded indemnification for the loss from Universal.

Universal claimed that the loaner was under Hollister’s care, custody, and control, which therefore created a bailment relationship, and that Hollister had neglected to return the property to Kerr in the same condition as it was delivered to him. Universal admitted that it insured Kerr for the relevant timeframe. Universal also claimed that Hollister was not an insured under its policy with Kerr because the loaner was being operated under dealer plates and Hollister was not required to be an insured under Nebraska’s Motor Vehicle Safety Responsibility Act. Universal asserted that the petition failed to state a cause of action, that a bailment relationship existed between Kerr and Hollister, and that, therefore, Allied was responsible for the damages as Hollister’s insurer.

Both Universal and Allied moved for summary judgment. On February 12, 2002, the district court sustained Allied’s motion for summary judgment and overruled Universal’s motion. The court found that coverage for the damages resulting from Hollister’s actions was provided by the Universal policy and not by the Allied policy. Universal’s motion for new trial was overruled, and Universal appealed.

ASSIGNMENTS OF ERROR

Universal claims the district court erred in holding that certain language in the Universal policy (“[i]f the permissive driver has no other insurance, the most WE will pay is the minimum financial responsibility law limits in the jurisdiction where the OCCURRENCE took pla[c]e”) was solely a statement as to the limits of the coverage provided. It also asserts that the court

erred in failing to hold that the language was also a condition of coverage of a customer using a service loaner automobile and in finding that Hollister was an additional insured under “Coverage Part 500” of the Universal policy.

ANALYSIS

The interpretation of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination made by the lower court. *Neff Towing Serv. v. United States Fire Ins. Co.*, 264 Neb. 846, 652 N.W.2d 604 (2002). We therefore interpret the insurance policies independent of the determination made by the district court.

The “State Amendatory Part” of Universal’s insurance policy provided the following additions to “Coverage Part 500”:

WHO IS AN INSURED, With respect to the AUTO HAZARD — the following insureds are added:

(5) any driver of a . . . SERVICE LOANER AUTO, but only within the scope of YOUR permission.

. . . THE MOST WE WILL PAY, item (1) — the following paragraph is added:

With respect to the AUTO HAZARD part (5) of WHO IS AN INSURED:

(a) If the permissive driver has no other insurance, the most WE will pay is the minimum financial responsibility law limits in the jurisdiction where the OCCURRENCE took place.

(b) If the permissive driver has other insurance (whether primary, excess or contingent) that is less than the minimum financial responsibility law limits where the OCCURRENCE took place, the most WE will pay is the amount by which the minimum financial responsibility law limits exceed the limit of their other insurance.

Universal argues that the district court erred in holding that language in its policy concerning the most it would pay was a statement as to the limits of the coverage provided, rather than finding that the language was also a condition of coverage for a customer using a service loaner automobile. Universal claimed that it provided coverage to Hollister only if his coverage from

the Allied policy was less than required by the minimum financial responsibility law, which is \$25,000 for property damage. (See Neb. Rev. Stat. § 60-534 (Cum. Supp. 2002)). Under Universal's interpretation of its policy, it was required to provide coverage for Hollister only if he had no insurance or had insurance which covered damages of less than \$25,000. The court found that this clause provided a limit on the amount Universal would pay, rather than an exclusion of coverage.

The liability portion of Allied's policy provides:

If there is other applicable liability insurance we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. However, any insurance we provide for a vehicle you do not own shall be excess over any other collectible insurance.

Thus, Allied's policy provided excess coverage for the particular risk in this case because Hollister was driving a nonowned automobile as a temporary substitute. Universal's policy was written to restrict its liability because Hollister had other insurance. Therefore, these policies contain mutually repugnant language. Both transfer liability to the other existing policy of insurance. Universal limits its liability based on other insurance, and Allied designates its coverage as excess.

"[W]hen controversies arise regarding insurance coverage because the applicable documents contain 'mutually repugnant language intended to restrict or escape liability for a particular risk in the event there exists other insurance . . . the owner's policy . . . provide[s] primary coverage and the driver's policy . . . provide[s] excess coverage.'" *State Farm Mut. Auto. Ins. Co. v. Cheeper's Rent-A-Car*, 259 Neb. 1003, 1011, 614 N.W.2d 302, 309 (2000).

In that case, the driver of a rental car owned by Cheeper's Rent-A-Car, Inc. (Cheeper's), was involved in a car accident. The driver had an insurance policy with State Farm Mutual Automobile Insurance Company (State Farm) which provided liability coverage resulting from the use of a temporary substitute car or a nonowned car. An amendment to the policy provided that the coverage for a temporary substitute car was excess over self-insurance. The rental agreement signed by the

driver provided that the liability policy of Cheeper's was secondary to the renter's liability insurance.

The trial court was therefore presented with two contracts: the rental agreement which incorporated liability insurance and the driver's insurance policy with State Farm. Each of the contracts "contain[ed] language which purport[ed] to place the primary responsibility in terms of liability on the issuer of the opposing contract." *Id.* This court found that the language in the driver's insurance policy and the rental agreement was mutually repugnant and that Cheeper's, the owner of the rental car, had primary liability for the damages to the car.

[2] The holding in *State Farm Mut. Auto. Ins. Co. v. Cheeper's Rent-A-Car*, *supra*, follows a line of cases in which this court has stated that when a conflict exists because insurance policies contain "mutually repugnant language intended to restrict or escape liability for a particular risk in the event there exists other insurance . . . the owner's policy . . . provide[s] primary coverage and the driver's policy . . . provide[s] excess coverage." See *Boren v. State Farm Mut. Auto. Ins. Co.*, 225 Neb. 503, 508, 406 N.W.2d 640, 644 (1987), citing *Jensen v. Universal Underwriters Ins. Co.*, 208 Neb. 487, 304 N.W.2d 51 (1981); *Bituminous Cas. Corp. v. Andersen*, 184 Neb. 670, 171 N.W.2d 175 (1969); *Farm Bureau Ins. Co. v. Allied Mut. Ins. Co.*, 180 Neb. 555, 143 N.W.2d 923 (1966); *Protective Fire & Cas. Co. v. Cornelius*, 176 Neb. 75, 125 N.W.2d 179 (1963); and *Turpin v. Standard Reliance Ins. Co.*, 169 Neb. 233, 99 N.W.2d 26 (1959).

[3] In *Jensen v. Universal Underwriters Ins. Co.*, *supra*, the driver was involved in an accident while driving a temporary replacement automobile. The automobile was covered by a garage policy issued by Universal, which stated that it covered insureds who had no liability insurance of their own. The driver's policy stated that it was excess with respect to a temporary substitute automobile. This court held that the owner's policy afforded coverage. "Where an excess insurance clause in a driver's automobile liability policy and a no-liability clause in the automobile owner's liability policy apparently conflict, the no-liability clause is ineffective and the driver's insurance excess." *Id.* at 492, 304 N.W.2d at 54, quoting *Bituminous Cas. Corp. v. Andersen*, *supra*.

In the present case, Universal's policy contained a limitation of liability clause, and Allied's policy contained an excess insurance clause. Following this court's precedent, Universal's attempt to avoid liability through the limitation of liability clause must be held to be ineffective, and Allied's insurance policy must be held to provide excess coverage.

The same type of situation arose in *Farm Bureau Ins. Co. v. Allied Mut. Ins. Co.*, *supra*. A temporary substitute automobile that was covered by a garage liability insurance policy with Allied was involved in an accident. The automobile was driven by a person who had received permission from a driver who was insured by Farm Bureau Insurance Company of Nebraska (Farm Bureau). The Farm Bureau policy provided that it was excess in the case of a temporary substitute automobile, and the Allied policy contained an endorsement which covered damages for a rental car provided by the garage while a customer's car was being serviced or repaired. This court held that the Allied garage policy provided primary coverage and that the Farm Bureau policy provided excess coverage to the extent of its policy limits. We stated:

In *Turpin v. Standard Reliance Ins. Co.*, 169 Neb. 233, 99 N. W. 2d 26 [1959], we held: "Where two motor vehicle liability policies contained identical omnibus clauses relating to prorating of loss occurring under the provisions of such policies and a driver, not the owner of the motor vehicle, was driving it with the owner's permission and became involved in an accident resulting in injury and property damage for which a judgment was obtained against him, the insurance carried by such driver would be excess over all other insurance, and the insurance carrier of the owner of the motor vehicle would be liable for the entire judgment sustained against the driver to the extent of the limit of such policy." (Emphasis supplied.) *Farm Bureau Ins. Co. v. Allied Mut. Ins. Co.*, 180 Neb. at 560-61, 143 N.W.2d at 926-27.

The mutually repugnant language in the two policies in the present case requires a finding that the owner's policy, written by Universal, provides the primary coverage.

Universal also assigns as error the district court's finding that Hollister was an additional insured under "Coverage Part 500" of the Universal policy. The policy defined an insured as "any

driver of a . . . SERVICE LOANER AUTO . . . within the scope of [the policyholder's] permission." A service loaner automobile is defined as "an AUTO that YOU provide for a customer's use while that CUSTOMER'S AUTO is in YOUR possession for safekeeping, storage, service or repair." The loaner destroyed in the fire was one provided by Kerr for Hollister's use while his automobile was in Kerr's possession for service. Hollister was an insured under Universal's policy when he was driving the loaner. It is clear that Hollister was an insured under Universal's policy at the time of the loss. There is no merit to this assignment of error.

Universal argues that this case is controlled by *Leader Nat. Ins. v. American Hardware Ins.*, 249 Neb. 783, 545 N.W.2d 451 (1996), because it claims the policy language is the same in each case. We disagree.

In *Leader Nat. Ins. v. American Hardware Ins.*, *supra*, Thomas Lustgraaf was insured by Leader National Insurance Company (Leader). He took a vehicle from Bellevue Nissan, Inc., for a test drive and had a collision which resulted in the filing of two lawsuits against him for property damage. Bellevue Nissan was insured by American Hardware Insurance Group (American). Lustgraaf demanded that American defend, indemnify, and pay all damages stemming from the accident, and American denied coverage. Leader defended Lustgraaf and settled all claims for \$9,418.05.

Leader sued American, claiming that American provided the primary coverage. This court concluded that customers of Bellevue Nissan who with permission borrowed a vehicle owned by Bellevue Nissan were insured only if the customers carried vehicle liability insurance less than that required by law. Since Lustgraaf was sufficiently insured as required by law to cover the damages he caused while driving the dealership's vehicle, Lustgraaf was not an insured under the policy issued by Leader. We concluded that Leader provided no coverage to Lustgraaf and that American had the primary duty to defend him.

In the present case, the district court distinguished *Leader Nat. Ins. v. American Hardware Ins.*, *supra*, because the Universal policy specifically covered a demonstrator or service loaner automobile. The court concluded that Universal did provide coverage for

an automobile supplied for a customer's use while the customer's automobile was in Kerr's possession for service or repair.

Universal also relies on *Universal Underwriters Ins. Co. v. Farm Bureau Ins. Co.*, 243 Neb. 194, 498 N.W.2d 333 (1993). The facts in that case are different from the case at bar. There, a service loaner was damaged, and Universal paid the automobile dealer, its insured. Universal then sought subrogation from Farm Bureau, the driver's insurer. The trial court found that the driver was an insured person under Universal's policy and that therefore Farm Bureau's coverage was excess to Universal's coverage. We reversed because we held that the driver was not an insured under Universal's policy, and therefore, the coverage provided by Farm Bureau was primary. In the present case, coverage was provided by Universal for the automobile driven by Hollister as a service loaner automobile.

This court is obligated to reach a conclusion independently of the determination made by the lower court. See *Neff Towing Serv. v. United States Fire Ins. Co.*, 264 Neb. 846, 652 N.W.2d 604 (2002). The insurance policies at issue contain mutually repugnant language, and when such is the case, the owner's policy provides primary coverage and the driver's policy provides excess coverage. Thus, in the case at bar, Universal's policy provides primary coverage and Allied's policy provides excess coverage.

CONCLUSION

Allied is entitled to a judgment against Universal as a matter of law. The judgment of the district court is affirmed.

AFFIRMED.

CONTINENTAL CASUALTY COMPANY, APPELLEE, v.
WALTER M. CALINGER, APPELLANT, AND KAY KONZ, APPELLEE.
657 N.W.2d 925

Filed March 21, 2003. No. S-02-565.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts

and that the moving party is entitled to judgment as a matter of law. Neb. Rev. Stat. § 25-1332 (Cum. Supp. 2002).

2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. ____: _____. In an appellate review, the grant of a motion for summary judgment may be affirmed on any ground available to the trial court, even if it is not the same reasoning the trial court relied upon.
4. **Insurance: Contracts: Actions.** If it is contended by an insured that a policy issued does not conform to the policy allegedly ordered from the agent, the remedy of the insured is not a suit at law, but, rather, the proper remedy is for a reformation of the policy to conform to the alleged oral understanding.
5. ____: ____: _____. An insured cannot disregard the written contract as evidenced by the policy of insurance issued to the insured and have an action at law upon an alleged oral agreement inconsistent with the policy or a recovery not warranted by the policy.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Affirmed.

John J. Reeve, Jr., for appellant.

Dean F. Suing, of Katskee, Henatsch & Suing, for appellee Continental Casualty Company.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, McCORMACK, and MILLER-LEMAN, JJ.

CONNOLLY, J.

In this appeal, we decide whether an agreement reached before the issuance of an insurance policy can provide coverage when the terms of the agreement are contrary to the express terms of the policy later issued to the insured. Continental Casualty Company (CNA) sought a declaratory judgment holding that CNA was not required to provide coverage for Walter M. Calinger for a \$1.5 million judgment rendered against him. In his answer and counterclaim, Calinger alleged that the terms of the insurance contract were provided by a letter from his insurance broker rather than by the policy language. Calinger, however, did not seek to reform the policy. The district court entered summary judgment for CNA.

We conclude that an agreement predating the issuance of an insurance policy cannot directly provide coverage different from that in the policy. Instead, the insured must first seek to reform the

policy in equity to conform to the agreement. Because Calinger did not seek to reform the policy, we affirm.

FACTUAL BACKGROUND

Underlying this case is a legal malpractice action brought by Kay Konz against Calinger. The circumstances giving rise to the malpractice case occurred in July 1988 when Calinger represented Konz in proceedings before the Iowa Industrial Commission. Konz filed suit against Calinger in May 1992, and the court entered a \$1.5 million judgment for her in August 1993. In June 2001, Konz filed a claim with CNA, asserting that CNA was required to provide coverage to Calinger under an insurance policy that it had issued to him in 1990. CNA denied the claim and filed this declaratory judgment action.

It is undisputed that sometime between December 1989 and February 1990, Calinger purchased CNA legal malpractice insurance. The parties, however, dispute if the terms of the insurance contract are provided by the policy or by an agreement that Calinger reached with Doris Goodwin, the insurance broker who sold him the insurance.

POLICY LANGUAGE

CNA argues that the terms of the policy issued to Calinger govern the scope of coverage. The policy clearly states in several places, including on the front page, that it is written on a “‘claims-made’ basis.” A claims-made policy is “[a]n agreement to indemnify against all claims made during a specified period, regardless of when the incidents that gave rise to the claims occurred.” Black’s Law Dictionary 809 (7th ed. 1999). The policy language also provided that CNA had no obligation for a claim, unless the claim was made against Calinger and reported to CNA during the policy term. Here, the policy term was December 29, 1989, to December 29, 1990. Konz did not file her malpractice action until 1992, and no claim was reported to CNA until 2001. Thus, if CNA’s argument that the policy governs the scope of coverage is correct, the insurance does not cover the Konz claim.

LETTERS

Calinger does not dispute that under the unambiguous terms of the policy, CNA has no obligation to provide coverage for the

Konz claim. Instead, he claims that when he purchased the policy, he and CNA, acting through Goodwin, reached an agreement about the scope of coverage. Calinger argues that this agreement, instead of the policy, should provide the terms of the contract. He contends that because a question exists whether the terms of the agreement with Goodwin are broad enough to cover the Konz claim, the court erred in granting summary judgment.

To support his argument, Calinger relies on an exchange of letters between him and Goodwin. On January 4, 1990, Goodwin sent a letter to Calinger, apparently in response to an application for insurance. It states:

Just received a memo from the Company [CNA] stating that they can offer your firm coverage for \$1,000,000 per claim, \$1,000,000 aggregate, with a \$1,000 deductible, and WITH FULL PRIOR ACTS COVERAGE, for an annual premium indication of \$1,721.00, to be effective December 29, 1989.

There is also available at an additional annual premium of \$30.00 per attorney Defendants Reimbursement. See enclosed and let us know if you desire this coverage.

If this would meet with your approval send your request to issue and your check for the full annual premium to this office by January 18, 1990, for processing.

(Emphasis in original.)

Calinger's secretary responded to the letter from Goodwin on January 18, 1990. The January 18 letter states: "Enclosed please find Mr. Calinger's check . . . in the amount of \$1,751.00 for *the coverage stated in your letter dated January 4, 1990*. This check is for the annual premium of \$1,721.00, and the added annual coverage of \$30.00 for the Defendants Reimbursement." (Emphasis supplied.)

According to Calinger, the January 4, 1990, letter does not offer claims-made coverage. Rather, he construes the language "WITH FULL PRIOR ACTS COVERAGE" in the January 4 letter as offering coverage for any act occurring before the effective date of the policy, regardless of when the claim was made. Under this interpretation of the language in the January 4 letter, the CNA insurance would cover the Konz claim because the acts giving rise to the Konz claim occurred before the effective date of the policy.

PROCEDURAL BACKGROUND

CNA brought a declaratory judgment action against Konz and Calinger. In its petition, CNA sought a declaration that no coverage existed under the policy. Calinger denied the allegations in CNA's petition and filed a counterclaim in which he asked the court to find that CNA was required to represent him in the Konz action and to pay any damages arising from the action. Calinger did not ask the court to reform the policy so that it reflected the alleged agreement that he reached with Goodwin. CNA moved for summary judgment against Calinger and Konz.

The district court granted the motion as to both parties. In rejecting Calinger's argument that the letters governed the scope of coverage, the court found that "no reasonable fact finder could construe the letter which Calinger received from his broker as constituting the contract that he had with the insurance company." Only Calinger appealed.

ASSIGNMENT OF ERROR

Calinger assigns, consolidated and restated, that the district court erred in its entry of summary judgment for CNA.

STANDARD OF REVIEW

[1] Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. See Neb. Rev. Stat. § 25-1332 (Cum. Supp. 2002) (proposition to be used only in case where summary judgment from which appeal is taken was entered on or after September 1, 2001).

[2] In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Day v. Heller*, 264 Neb. 934, 653 N.W.2d 475 (2002).

[3] In an appellate review, the grant of a motion for summary judgment may be affirmed on any ground available to the trial court, even if it is not the same reasoning the trial court relied upon. *Id.*

ANALYSIS

Calinger argues that a question of disputed fact exists whether he reached an agreement with Goodwin before the policy was issued. We agree that a disputed fact question exists. But the mere existence of a disputed fact question is not enough to preclude summary judgment. The fact question must be material. See *Day v. Heller, supra*. The disputed fact question in this case is only material if an agreement predating the issuance of an insurance policy can provide coverage when the terms of the agreement are contrary to the express terms of the policy later issued to the insured.

[4,5] We addressed the legal question presented by this case in *Rodine v. Iowa Home Mutual Cas. Co.*, 171 Neb. 263, 106 N.W.2d 391 (1960). We said:

[I]f it is contended by an insured that a policy issued does not conform to the policy allegedly ordered from the agent, the remedy of the insured is not a suit at law . . . but[, rather,] the proper remedy is for a reformation of the policy to conform to the alleged oral understanding. . . . A litigant cannot, however, disregard the written contract as evidenced by a policy of insurance issued to him and have an action at law upon an alleged oral agreement inconsistent with the policy or a recovery not warranted by the policy.

Id. at 280, 106 N.W.2d at 400.

Here, CNA brought a declaratory judgment action against Calinger. Calinger sought to defend the lawsuit and to file his own counterclaim because the agreement with Goodwin, rather than the policy, provided coverage. *Rodine* forbids this type of direct reliance on an agreement that precedes the issuance of the policy. Calinger should have filed a counterclaim in equity seeking to reform the policy language. Having failed to do this, the question whether he reached an agreement with Goodwin is immaterial. The plain and unambiguous language of the policy controls, and CNA had no obligation to provide coverage to Calinger.

CONCLUSION

The district court did not err in granting summary judgment for CNA. We affirm.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.

TERRY W. KELLEY, APPELLANT.

658 N.W.2d 279

Filed March 21, 2003. No. S-02-742.

1. **Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress evidence, ultimate determinations of reasonable suspicion are reviewed de novo by an appellate court, while findings of historical fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge.
2. **Constitutional Law: Search and Seizure.** In Nebraska, freedom from unreasonable searches and seizures is guaranteed by U.S. Const. amend. IV and Neb. Const. art. I, § 7.
3. **Constitutional Law: Search and Seizure: Evidence: Trial.** Evidence obtained as the fruit of an illegal search or seizure, in violation of the Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution, is inadmissible in a state prosecution and must be excluded.
4. **Search and Seizure: Search Warrants: Probable Cause: Police Officers and Sheriffs: Proof.** Searches conducted pursuant to a warrant supported by probable cause are generally considered to be reasonable; consequently, if the police act pursuant to a search warrant, the defendant bears the burden of proof that the search or seizure is unreasonable.
5. **Search Warrants.** Neb. Rev. Stat. § 29-411 (Reissue 1995) codifies the common-law requirement of knocking and announcing when serving a search warrant prior to breaking into a person's dwelling.
6. **Constitutional Law: Search and Seizure: Police Officers and Sheriffs.** The Fourth Amendment to the U.S. Constitution requires that officers knock and announce their purpose and be denied admittance prior to breaking into a dwelling, absent certain circumstances. The common-law knock-and-announce principle forms a part of a Fourth Amendment inquiry into reasonableness, and an officer's unannounced entry into a home might, in some circumstances, be unreasonable under the Fourth Amendment.
7. **Search and Seizure: Police Officers and Sheriffs.** In order to justify a "no-knock" entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime.
8. **Constitutional Law: Search Warrants: Police Officers and Sheriffs.** Following a knock and announcement, the requirement that officers executing a search warrant be "refused admittance," within the meaning of statutory and constitutional requirements, is not restricted to an affirmative refusal, but encompasses circumstances that constitute constructive or reasonably inferred refusal.
9. **Probable Cause: Words and Phrases.** Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized suspicion or "hunch," but less than the level of suspicion required for probable cause.

10. **Police Officers and Sheriffs: Probable Cause.** In determining whether a police officer acted reasonably, it is not the officer's inchoate or unparticularized suspicion or hunch that will be given due weight, but the specific reasonable inferences which the officer is entitled to draw from the facts in light of the officer's experience.
11. ____: _____. Whether a police officer has a reasonable suspicion based upon sufficient, articulable facts requires taking into account the totality of the circumstances. The "totality of the circumstances" principle governs the existence vel non of "reasonable suspicion."
12. **Search Warrants: Police Officers and Sheriffs: Case Disapproved.** Forced entry in the execution of a search warrant is justified if police have a reasonable suspicion that knocking and announcing, or continuing to knock and announce, would be dangerous, futile, or destructive to the purposes of the investigation. Whether such a reasonable suspicion exists depends in no way on whether police must destroy property in order to enter, disapproving *State v. Moore*, 3 Neb. App. 909, 535 N.W.2d 417 (1995).
13. **Effectiveness of Counsel: Records: Appeal and Error.** A claim of ineffective assistance of counsel need not necessarily be dismissed merely because it is made on direct appeal; the determining factor is whether the record is sufficient to adequately review the question.
14. **Effectiveness of Counsel: Evidence: Appeal and Error.** Some types of attack upon effectiveness of counsel cannot be reached upon a direct appeal because the evidence which may bear upon such a determination is not shown in the trial record.
15. **Effectiveness of Counsel: Appeal and Error.** When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel.
16. **Criminal Law: Trial: Attorney and Client.** An appellate court gives due deference to defense counsel's discretion in formulating trial tactics.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed.

W. Randall Paragas, of Paragas Law Offices, for appellant.

Don Stenberg, Attorney General, and George R. Love for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

NATURE OF CASE

Terry W. Kelley, the appellant, was convicted by the district court of possession of methamphetamine with intent to deliver and was sentenced to imprisonment for a term of 6 to 12 years. The issue presented in this appeal is whether the district court

erred in denying Kelley's motion to suppress evidence obtained in a search of his home, based on his claim that the police failed to properly knock and announce their presence prior to entering the dwelling.

BACKGROUND

On January 16, 2001, officers of the Omaha Police Department and deputies of the Sarpy County Sheriff's Department obtained a search warrant for Kelley's residence in Sarpy County. The affidavit supporting issuance of the warrant averred facts generally indicating that the residence was being used for the sale and consumption of methamphetamine. The validity of the affidavit and warrant is not at issue in this appeal. The warrant specified that service should occur during the daytime hours between 7 a.m. and 8 p.m. and that the police were to knock and announce their presence. The police did not seek issuance of a no-knock search warrant. However, an Omaha police officer testified at the hearing on Kelley's motion to suppress that methamphetamine in ounce or even multi-ounce weights can be easily destroyed by flushing it down a toilet or sink.

The warrant was executed on January 17, 2001, at about 6:55 p.m., by a team of approximately 15 officers and deputies. Initial entry into the dwelling was made by three deputies from the Sarpy County Sheriff's Department: John Sorensen, Rick Wheeler, and Brian Fjelstad. The three approached the door, wearing helmets and uniforms that read " 'Sheriff' " in bold letters. Wheeler knocked. Shortly thereafter, Wheeler opened the door and Fjelstad led the deputies into the dwelling.

The testimony given at the hearing on Kelley's motion to suppress regarding execution of the warrant generally described a similar sequence of events, but differed somewhat on some of the details. Sorensen testified as follows:

I was the third person in our stack as we walked up to that front door. As we go to the door, one officer has a shield. He steps back. Deputy Wheeler knocks on the door.

As soon as Deputy Wheeler knocked or about the same time, I saw a female look out the front window which is right next to that front door and looked very surprised and took off, appeared to be running.

At that time I yelled "compromise" which means somebody has seen us. Deputy Wheeler continued knocking three to five seconds, kept knocking; heard a loud commotion inside the house. And with that, we went in and entered the residence.

Sorensen testified that Wheeler knocked loudly on the door and yelled "'sheriff's office.'" Sorensen later testified that in his opinion, approximately 5 to 10 seconds elapsed between the time Sorensen yelled "compromise" and the time they entered the dwelling. Fjelstad also testified that the time from the initial knock to entry into the dwelling was about 5 to 15 seconds.

Wheeler testified that he had knocked loudly, calling out his "standard words," "'[S]heriff's office. We demand entry. We have a search warrant.'" According to Wheeler, 5 seconds later, Sorensen said they had been compromised. Wheeler testified that he continued knocking, waiting for the individual who had appeared in the window to come to the door. Wheeler said that the window through which the woman had been seen was right next to the door, but no one came to the door or spoke to the deputies. Unlike Sorensen, Wheeler did not hear people inside the house. Wheeler testified that about 5 seconds after they had been compromised, Wheeler checked the door handle and found that the door was unlocked, so he opened the door and the deputies entered.

Kelley's wife testified that she had been sitting on the couch when she heard her dogs make a noise. She testified that she looked out the window, heard two knocks on the door, and then the deputies came through the door. Kelley's wife testified that the time that elapsed between her looking out the window and the deputies' entry into the dwelling was less than 5 seconds, "like a second." Kelley's wife did not hear the deputies yell "police" or any words to that effect.

Kelley testified that he had been upstairs at the time. Kelley testified:

I'd walked out of the bathroom. And just instantly, you know, my wife said, "Terry," and there was a bam, bam, very abrupt, two knocks on the door, bam, bam, and the door flew open and "get down on the ground," you know. "Sheriff's Department," blah, blah, blah, after they entered the house.

Kelley testified that no more than 5 seconds elapsed—that the door opened on the second knock. Kelley stated that neither he nor his wife had a chance to get to the door before it was opened. Both Kelley and his wife testified that the deputies forced their way through the front door, damaging the door in the process.

Once inside, officers discovered drug paraphernalia and a substance later determined to be methamphetamine. Kelley was arrested. He was charged by information in the district court with possession of a controlled substance and possession of a controlled substance with intent to deliver. Kelley filed a pretrial motion to suppress evidence obtained during the search. The district court denied Kelley's motion, making detailed findings as follows:

The primary issue is whether the evidence showed sufficient circumstances and necessity for the officers to enter the premises without further knocking or announcing when considering officer safety and prevention of the destruction of evidence. This Court accepts Deputy Wheeler's testimony as the more credible, that being that there was several seconds of knocking and announcing followed by Deputy Sorenson's [sic] warning of compromise, and then continued knocking and announcing for a time sufficient to allow an occupant to get to the door and open it prior to the entry of the team. Even though Deputy Wheeler testified the total time he spent knocking would not have been more than 10 to 15 seconds, this seems the more credible version of events. I also find it more credible that the door was opened without the use of a battering ram and that there was no damage to the door.

[I]n the case at bar, the credible evidence supports a finding that an announcement was made, and additionally, that an exigent circumstance existed to permit entry into the home. That exigency was the presence of defendant's wife, who, by her own admission, looked out the window near the front door and saw the deputies outside. Once the officers were detected, considering the officers were executing a warrant in search of controlled substances which could have been destroyed, it was reasonable for the officers to

only knock and announce for a few more seconds before gaining entry to the residence. The more credible testimony, and that which is accepted by this Court, supports the conclusion that the execution of the “knock and announce” warrant was reasonable under the Fourth Amendment

After the motion to suppress was denied, Kelley waived a jury trial and trial was had to the court on stipulated facts subject to Kelley’s motion to suppress. Kelley was convicted of possession of a controlled substance with intent to deliver and, on July 2, 2001, was sentenced to 6 to 12 years’ imprisonment. Kelley did not appeal initially, but later filed a motion for postconviction relief based on his attorney’s failure to perfect an appeal; Kelley was awarded a new direct appeal, which he timely filed. See, generally, *State v. McCracken*, 260 Neb. 234, 615 N.W.2d 902 (2000), *abrogated on other grounds*, *State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002). We moved Kelley’s new direct appeal to our docket pursuant to our authority to regulate the caseloads of this court and the Nebraska Court of Appeals. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENTS OF ERROR

Kelley assigns that the district court erred in finding that the deputies properly executed their “‘knock and announce’” search warrant and in overruling his motion to suppress evidence. Kelley also claims that he is entitled to “a re-hearing on his Motion to Suppress” due to the ineffective assistance of trial counsel.

STANDARD OF REVIEW

[1] In reviewing a trial court’s ruling on a motion to suppress evidence, ultimate determinations of reasonable suspicion are reviewed de novo by an appellate court, while findings of historical fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge. See, *Ornelas v. United States*, 517 U.S. 690, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996); *State v. Keup*, ante p. 96, 655 N.W.2d 25 (2003); *State v. McCleery*, 251 Neb. 940, 560 N.W.2d 789 (1997).

ANALYSIS

[2-4] Kelley’s first argument is that the evidence against him should have been suppressed as the fruit of an illegal search. In

Nebraska, freedom from unreasonable searches and seizures is guaranteed by U.S. Const. amend. IV and Neb. Const. art. I, § 7. *State v. Ortiz*, 257 Neb. 784, 600 N.W.2d 805 (1999). Evidence obtained as the fruit of an illegal search or seizure, in violation of the Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution, is inadmissible in a state prosecution and must be excluded. *State v. Cuny*, 257 Neb. 168, 595 N.W.2d 899 (1999). Searches conducted pursuant to a warrant supported by probable cause are generally considered to be reasonable; consequently, if the police act pursuant to a search warrant, the defendant bears the burden of proof that the search or seizure is unreasonable. *State v. Swift*, 251 Neb. 204, 556 N.W.2d 243 (1996).

[5,6] Neb. Rev. Stat. § 29-411 (Reissue 1995) provides, in relevant part:

In executing a warrant for the arrest of a person charged with an offense, or a search warrant, or when authorized to make an arrest for a felony without a warrant, the officer may break open any outer or inner door or window of a dwelling house or other building, if, after notice of his office and purpose, he is refused admittance

This statute codifies the common-law requirement of knocking and announcing when serving a search warrant prior to breaking into a person's dwelling. *State v. Moore*, 3 Neb. App. 909, 535 N.W.2d 417 (1995), citing *Wilson v. Arkansas*, 514 U.S. 927, 115 S. Ct. 1914, 131 L. Ed. 2d 976 (1995). In addition, the U.S. Supreme Court held in *Wilson, supra*, that the Fourth Amendment requires that officers knock and announce their purpose and be denied admittance prior to breaking into a dwelling, absent certain circumstances. The common-law knock-and-announce principle forms a part of a Fourth Amendment inquiry into reasonableness, and an officer's unannounced entry into a home might, in some circumstances, be unreasonable under the Fourth Amendment. *Wilson, supra*. But not every entry must be preceded by an announcement. *Id.* The Fourth Amendment's flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests. *Wilson, supra*. The *Wilson* Court declined, however,

to “attempt a comprehensive catalog of the relevant counter-vailing factors.” 514 U.S. at 936.

[7] The U.S. Supreme Court revisited the *Wilson* knock-and-announce principle in *Richards v. Wisconsin*, 520 U.S. 385, 117 S. Ct. 1416, 137 L. Ed. 2d 615 (1997). In that case, the Wisconsin Supreme Court had held that *Wilson*, *supra*, did not preclude its pre-*Wilson* rule that because of the special circumstances of the drug culture, police officers are *never* required to knock when executing a search warrant in a felony drug investigation. The U.S. Supreme Court, relying on *Wilson*, rejected this “blanket exception” to the knock-and-announce principle. See *Richards*, *supra*. The Court held:

In order to justify a “no-knock” entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence. This standard—as opposed to a probable-cause requirement—strikes the appropriate balance between the legitimate law enforcement concerns at issue in the execution of search warrants and the individual privacy interests affected by no-knock entries.

520 U.S. at 394. The Court determined, however, that under the circumstances presented in the case, the entry by officers into the premises in question was justified. Those circumstances merit a more detailed examination, because of the evident similarities between them and the facts of the instant case.

On December 31, 1991, police officers in Madison, Wisconsin, obtained a warrant to search Steiney Richards’ motel room for drugs and related paraphernalia. The search warrant was the culmination of an investigation that had uncovered substantial evidence that Richards was one of several individuals dealing drugs out of hotel rooms in Madison. The police requested a warrant that would have given advance authorization for a “no-knock” entry into the motel room, but the Magistrate explicitly deleted those portions of the warrant. . . .

The officers arrived at the motel room at 3:40 a.m. Officer Pharo, dressed as a maintenance man, led the team.

With him were several plainclothes officers and at least one man in uniform. Officer Pharo knocked on Richards' door and, responding to the query from inside the room, stated that he was a maintenance man. With the chain still on the door, Richards cracked it open. Although there is some dispute as to what occurred next, Richards acknowledges that when he opened the door he saw the man in uniform standing behind Officer Pharo. . . . He quickly slammed the door closed and, after waiting two or three seconds, the officers began kicking and ramming the door to gain entry to the locked room. At trial, the officers testified that they identified themselves as police while they were kicking the door in. . . . When they finally did break into the room, the officers caught Richards trying to escape through the window. They also found cash and cocaine hidden in plastic bags above the bathroom ceiling tiles.

Richards v. Wisconsin, 520 U.S. 385, 388-89, 117 S. Ct. 1416, 137 L. Ed. 2d 615 (1997). The Court determined:

Although we reject the Wisconsin court's blanket exception to the knock-and-announce requirement, we conclude that the officers' no-knock entry into Richards' motel room did not violate the Fourth Amendment. We agree . . . that the circumstances in this case show that the officers had a reasonable suspicion that Richards might destroy evidence if given further opportunity to do so.

The judge who heard testimony at Richards' suppression hearing concluded that it was reasonable for the officers executing the warrant to believe that Richards knew, after opening the door to his motel room the first time, that the men seeking entry to his room were the police. . . . Once the officers reasonably believed that Richards knew who they were, the court concluded, it was reasonable for them to force entry immediately given the disposable nature of the drugs. . . .

. . . At the time the officers obtained the warrant, they did not have evidence sufficient, in the judgment of the Magistrate, to justify a no-knock warrant. Of course, the Magistrate could not have anticipated in every particular the circumstances that would confront the officers when

they arrived at Richards' motel room. These actual circumstances—petitioner's apparent recognition of the officers combined with the easily disposable nature of the drugs—justified the officers' ultimate decision to enter without first announcing their presence and authority.

520 U.S. at 395-96.

[8] Also pertinent to our analysis is the principle that following a knock and announcement, the requirement that officers executing a search warrant be "refused admittance," within the meaning of statutory and constitutional requirements, is not restricted to an affirmative refusal, but encompasses circumstances that constitute constructive or reasonably inferred refusal. See, e.g., *U.S. v. Bonner*, 874 F.2d 822 (D.C. Cir. 1989). See, also, *State v. Moore*, 3 Neb. App. 909, 535 N.W.2d 417 (1995). In making such judgments, courts employ a highly contextual analysis, examining all the circumstances of the case, to determine whether the record establishes the existence of a constructive refusal. *Bonner*, *supra*.

Based on the principle of constructive refusal, courts have determined, under circumstances very comparable to those of the instant case, that officers acted reasonably in determining that they had been denied admittance to premises to be searched. For instance, in *Bonner*, *supra*, police officers knocked on the front door of an apartment and announced their identity and presence to those they knew to be within. After approximately 11 to 12 seconds, the officers heard footsteps running from the door, and some "faint thumping or bumping inside the premises," and they forced the door open. *Id.* at 823.

The D.C. Circuit determined that the record "strongly support[ed]" the conclusion that the officers had been refused admittance, and for the reasonableness of their actions. *Id.* at 824. First, the court noted that drugs and evidence of drug trafficking are peculiarly susceptible to ready destruction. Second, the court noted that when police officers are entering a premises investigating drug activity and have announced their presence and identity, they face a "danger-fraught situation" in which they may reasonably infer refusal more readily than under other circumstances. *Id.* Third, the court noted that while the warrant issued had not been a no-knock warrant, the warrant process had tested

and certified the information supporting the search. Fourth, the court stated that in view of the officers' knowledge that persons were present inside the small apartment, and the execution of the warrant during the early evening hours, the lack of response within approximately 10 seconds following the first announcement of purpose was particularly probative of refusal. Fifth, the officers heard sounds from inside the premises consistent with both refusal of admittance and destruction of the object of the search. "When conducting a search for evidence that is readily destroyed, officers may resolve the ambiguity of a noise from within the place to be searched in a manner consistent with executing the warrant safely and successfully." *Id.* at 825. Finally, the court stated that the delay of approximately 11 to 12 seconds from the start of the officers' first announcement, with no indication that they would be admitted, supported the conclusion that they had been refused admittance. *Id.*

In light of the foregoing analysis, the court determined that the delay before entering the premises supported a reasonable conclusion that the officers had been refused admittance. See *id.* See, also, e.g., *United States v. Chambers*, 382 F.2d 910, 914 (6th Cir. 1967) (refusal of admittance after "brief interval of time" inferred from person coming to door and pulling back shade, but retreating from door); *State v. Long*, 163 Wis. 2d 261, 471 N.W.2d 248 (Wis. App. 1991) (delay of 7 to 10 seconds at outer door, and another 5 to 7 seconds at inner door, reasonable where officer spoke to occupant through window); *People v. Hill*, 3 Cal. App. 3d 294, 83 Cal. Rptr. 305 (1970) (breaking of door reasonable when occupant pulled curtains apart, then disappeared from view, followed by sound of quick movement inside apartment).

[9-11] Similarly, we conclude that the record in the instant case supports a reasonable suspicion that it would have been futile, and that it would have inhibited the effective investigation of the crime, for the deputies to continue to knock and announce their identity and purpose prior to their entry into Kelley's residence. See *Richards v. Wisconsin*, 520 U.S. 385, 117 S. Ct. 1416, 137 L. Ed. 2d 615 (1997). Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized suspicion or "hunch," but less than the level of suspicion required for probable cause. *State v.*

Anderson, 258 Neb. 627, 605 N.W.2d 124 (2000). See *United States v. Arvizu*, 534 U.S. 266, 122 S. Ct. 744, 151 L. Ed. 2d 740 (2002). It is not the officer's inchoate or unparticularized suspicion or hunch that will be given due weight, but the specific reasonable inferences which the officer is entitled to draw from the facts in light of the officer's experience. *State v. McCleery*, 251 Neb. 940, 560 N.W.2d 789 (1997). See *Arvizu*, *supra*. Whether a police officer has a reasonable suspicion based upon sufficient, articulable facts requires taking into account the totality of the circumstances. *Anderson*, *supra*. The "totality of the circumstances" principle governs the existence vel non of "reasonable suspicion." *Arvizu*, *supra*.

The district court in this case made clear and detailed findings of historical fact that are supported by the record and are not clearly erroneous. The record supports the district court's findings that 10 to 15 seconds elapsed from the initial announcement to the forced entry and that during that time, the deputies saw Kelley's wife, in close proximity to the door, observe their presence. The record also reveals that a "commotion" was heard inside the house and that the evidence being sought was of a kind that is easily destroyed. As in *Richards*, *supra*, once the deputies reasonably believed that Kelley's wife knew who they were, and did not respond to the knock at the door, it was reasonable for them to force entry shortly thereafter, given the disposable nature of the drugs. The "apparent recognition of the officers combined with the easily disposable nature of the drugs—justified the officers' ultimate decision to enter" without continuing to announce their presence and authority. See 520 U.S. at 396.

There is no dispute that Kelley's wife was seen looking out a window directly adjacent to the door on which the deputies were knocking. The district court credited Wheeler's testimony that the deputies gave Kelley's wife enough time to proceed directly to the door and open it, or to communicate with them. Instead, Sorensen testified that Kelley's wife "looked very excited and left," followed by the "commotion" inside the house. Given these circumstances, as in *U.S. v. Bonner*, 874 F.2d 822 (D.C. Cir. 1989), it was reasonable for the deputies to conclude that they had constructively been refused admittance to the premises.

Taking into account the totality of the circumstances, the record contains sufficient, articulable facts from which the deputies could reasonably infer that it would have been futile, and that it would inhibit the effective investigation of the crime, to continue to knock and announce their identity and purpose for a substantial period of time given that Kelley's wife looked out the window and proceeded away from the directly adjacent door rather than responding to the deputies' knocking. Kelley's assignment of error regarding his motion to suppress is without merit.

[12] In arguing to the contrary, Kelley, in his appellant's brief, relies extensively on *U.S. v. Mendonsa*, 989 F.2d 366 (9th Cir. 1993), for the proposition that a heightened standard is applied to exigent circumstances when property damage results from entry into the premises. However, Kelley's brief fails to mention that the Ninth Circuit's property-based exigency rule was squarely rejected by the U.S. Supreme Court in *United States v. Ramirez*, 523 U.S. 65, 118 S. Ct. 992, 140 L. Ed. 2d 191 (1998), or that this rejection was recognized by the Ninth Circuit in *LaLonde v. County of Riverside*, 204 F.3d 947 (9th Cir. 2000). Under *Richards v. Wisconsin*, 520 U.S. 385, 117 S. Ct. 1416, 137 L. Ed. 2d 615 (1997), forced entry in the execution of a search warrant is justified if police have a reasonable suspicion that knocking and announcing, or continuing to knock and announce, would be dangerous, futile, or destructive to the purposes of the investigation. Whether such a reasonable suspicion exists depends in no way on whether police must destroy property in order to enter. *Ramirez*, *supra*. In short, that aspect of *Mendonsa* was overruled by the U.S. Supreme Court in *Ramirez*. We also note that the rule set forth in *Mendonsa* was referred to by the Court of Appeals, prior to the *Ramirez* decision, in *State v. Moore*, 3 Neb. App. 909, 535 N.W.2d 417 (1995). *Moore* is disapproved to that limited extent.

Finally, Kelley claims that he is entitled to a rehearing on his motion to suppress due to the ineffective assistance of trial counsel. Kelley complains of deficiencies in his counsel's cross-examination of certain witnesses, his counsel's failure to object to certain fruits of the purportedly illegal search, and his counsel's failure to object to certain evidence that Kelley claims was irrelevant.

[13,14] A claim of ineffective assistance of counsel need not necessarily be dismissed merely because it is made on direct appeal; the determining factor is whether the record is sufficient to adequately review the question. *State v. Long*, 264 Neb. 85, 645 N.W.2d 553 (2002). Some types of attack upon effectiveness of counsel cannot be reached upon a direct appeal because the evidence which may bear upon such a determination is not shown in the trial record. *State v. Lindsay*, 246 Neb. 101, 517 N.W.2d 102 (1994).

[15,16] When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel. *State v. Buckman*, 259 Neb. 924, 613 N.W.2d 463 (2000). An appellate court gives due deference to defense counsel's discretion in formulating trial tactics. See *State v. Williams*, 259 Neb. 234, 609 N.W.2d 313 (2000). We conclude, in the instant case, that absent an evidentiary hearing regarding trial strategy, the record before us is insufficient to determine whether counsel's performance was deficient or was the result of reasonable trial strategy. For that reason, we decline to address Kelley's ineffective assistance of counsel claim.

CONCLUSION

Considering the totality of the circumstances and giving due weight to the district court's findings of historical fact, we conclude that the record contains sufficient, articulable facts from which the deputies could reasonably infer that it was futile and that it would have inhibited the effective investigation of the crime to continue to knock and announce their presence prior to entering Kelley's dwelling. The record is not sufficient for us to evaluate Kelley's claim of ineffective assistance of counsel. Therefore, the judgment of the district court is affirmed.

AFFIRMED.

ROBERT L. ANDERSON AND LAVISTA LOTTERY, INC., APPELLEES, v.
RICHARD T. BELLINO AND LAVISTA KENO, INC., APPELLANTS.

658 N.W.2d 645

Filed March 28, 2003. No. S-01-584.

1. **Actions: Trusts: Equity.** An action to impose a constructive trust sounds in equity.
2. **Equity: Appeal and Error.** In an appeal of an equitable action, an appellate court tries factual questions de novo on the record, provided that when credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Corporations.** In order to be a corporate opportunity, the business must generally be one of practical advantage to the corporation and must fit into and further an established corporate policy.
4. **Corporations: Equity.** Directors occupy a fiduciary relation toward the corporation and its stockholders and are treated by courts of equity as trustees.
5. **Corporations.** A corporate director may not compete with the corporation if the director's competition causes or contributes to the injury or damage of the corporation or deprives it of business.
6. _____. The general rule is that a director cannot acquire an interest adverse to that of the corporation when dealing individually with third persons.
7. **Trusts: Property: Title: Equity.** A constructive trust is a relationship, with respect to property, subjecting the person who holds title to the property to an equitable duty to convey it to another on the ground that his or her acquisition or retention of the property would constitute unjust enrichment.
8. **Trusts: Property: Stock.** Intangible property and liquid assets such as stocks and bank and investment accounts may be held subject to a constructive trust.
9. **Trusts: Property: Title: Equity.** Regardless of the nature of the property upon which the constructive trust is imposed, a plaintiff seeking to establish the trust must prove by clear and convincing evidence that the individual holding the property obtained title to it by fraud, misrepresentation, or an abuse of an influential or confidential relationship and that under the circumstances, such individual should not, according to the rules of equity and good conscience, hold and enjoy the property so obtained.
10. **Equity.** Where a situation exists which is contrary to the principles of equity and which can be redressed within the scope of judicial action, a court of equity will devise a remedy to meet the situation.
11. **Corporations: Trusts: Courts.** The traditional remedy imposed by courts upon a finding of a misappropriation of a corporate opportunity is the impression of a constructive trust in favor of the corporation upon the property.
12. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it.
13. **Trusts: Accounting.** The purpose of an accounting for a constructive trust is to adjust the accounts of the parties and render complete justice.
14. **Trusts: Unjust Enrichment.** In the theory of unjust enrichment, a constructive trustee may be compelled to convey or assign the corpus of a trust property and to account for and pay over rents, profits, issues, and income which the constructive

trustee has actually received or, in general, which he or she might by exercise of reasonable care and diligence have received.

15. **Trusts.** A trustee, including a constructive trustee, may be reimbursed or indemnified for expenses incurred or advances made in the execution of the trust, so long as the expenses or advances are considered proper in the administration of the trust.
16. **Trial: Evidence: Records: Appeal and Error.** The admission of evidence which is primarily duplicative of other evidence admitted into the record is not reversible error.

Appeal from the District Court for Cass County: RANDALL L. REHMEIER, Judge. Affirmed.

William F. Hargens and Kathryn D. Folts, of McGrath, North, Mullin & Kratz, P.C., for appellants.

Thomas J. Culhane and Patrick R. Guinan, of Erickson & Sederstrom, P.C., for appellees.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

I. NATURE OF CASE

Appellees, Robert L. Anderson and LaVista Lottery, Inc. (Lottery), brought this action in Cass County District Court against appellants, Richard T. Bellino and LaVista Keno, Inc. (Keno). Anderson and Lottery alleged that Bellino had breached a fiduciary duty he owed to Anderson and Lottery by usurping a corporate opportunity belonging to Lottery and directing such opportunity to Keno. Bellino and Keno denied the critical allegations in the petition, and Bellino further responded by filing a claim for a setoff and a counterclaim seeking, inter alia, compensation for services he had provided to Lottery.

Trial in the case was bifurcated. At the conclusion of the liability phase, the district court concluded that Bellino, an officer, director, and 50-percent shareholder in Lottery, had breached the duty of “‘utmost good faith and loyalty’” which he owed to Anderson and Lottery. The district court reached this conclusion because Bellino had formed his own corporation, Keno, and had successfully bid against Lottery for the 1998 contract to operate a keno parlor in LaVista, Nebraska. The district court imposed a constructive trust upon Keno for the benefit of Anderson and

Lottery and reserved further ruling until completion of the accounting phase of the case. The district court denied Bellino relief on his claim for a setoff and on his counterclaim. Trial was had on the accounting. In view of the breach of fiduciary duty and in furtherance of the constructive trust, following the accounting phase of the trial, the district court awarded relief to Anderson and Lottery. The district court, *inter alia*, ordered Bellino to pay Anderson and Lottery \$644,992.63, representing sums by which Keno had been improperly diminished and other sums Bellino had inequitably received in connection with the operation of Keno, which amount could be reduced by \$172,514.63 if Bellino were successfully to transfer the stock of Keno to Lottery and persuade the city of LaVista to relicense the keno contract from Keno in favor of Lottery.

Bellino and Keno appeal. Following our review, we conclude that the district court did not err in determining there had been a breach of fiduciary duty, imposing a constructive trust, and accounting therefor. Accordingly, we affirm.

II. STATEMENT OF FACTS

In 1989, the city of LaVista was seeking bids for the operation of a keno-type lottery for the city. Bellino, an electrician by training and experience, became interested in bidding. The bid specifications included a restaurant and lounge to be operated in connection with the keno operation. Bellino testified that he wanted someone to share the financial risk of a potential keno operation. In addition, Bellino wanted to find someone with experience in the restaurant and lounge business. At least two people declined to bid with Bellino, and he eventually approached Anderson, who evidently was involved in a number of successful businesses, liked to play keno, and knew people in the gaming industry. Anderson was aware of the bidding. Anderson and Bellino began investigating the keno business. They sought the advice of experienced operators in Reno, Nevada, who had contacts with keno equipment suppliers and who explained the mechanics of the industry. In addition, Bellino and Anderson investigated potential locations for the keno operation.

In March 1989, Bellino and Anderson submitted their bid for the LaVista keno contract. In April 1989, Bellino and Anderson

formed Lottery, a Nebraska corporation, for the purpose of operating the keno parlor if they were awarded the contract. Anderson and Bellino each owned 50 percent of the shares of stock of Lottery, and both were officers and directors of the corporation. Bellino was the president and treasurer, and Anderson was the vice president and secretary.

The bid submitted by Anderson and Bellino was successful. Lottery entered into a lottery operation contract with the city of LaVista on May 16, 1989. The initial contract was for a 5-year term. After the keno parlor was opened, the contract was amended several times. Pursuant to the fifth amendment, executed on October 13, 1992, the fixed term of the contract was extended through July 31, 1998, with a provision that the term would continue indefinitely beyond that fixed term until one party served 60 days' written notice of termination upon the other.

Following the award of the contract, Bellino and Anderson arranged for Lottery to lease space for the keno operation, purchase necessary equipment, and hire management and nonmanagement employees. Bellino and Anderson shared the initial investment of around \$300,000 plus equipment.

Lottery initially entered into a lease with LaVista Commercial Partnership for space in the LaVista Plaza. Subsequently, Bellino purchased LaVista Plaza. Thereafter, Bellino leased the space in LaVista Plaza to Lottery.

The keno parlor operated by Lottery was successful. During the approximately 9 years that Lottery operated the keno parlor, the district court found, and the record supports the finding, that Lottery "had total gross receipts in excess of 100 million dollars" and that "Bellino and Anderson each personally received over 4 million dollars in salary and distributions during that time period." Initially, Anderson and Bellino received salaries from Lottery. In 1993, following the advice that Bellino told Anderson he had received from an accountant, Anderson and Bellino stopped receiving salaries from Lottery. Anderson and Bellino, as equal shareholders in Lottery, divided the profits from the operation of the keno parlor equally. In addition, because Lottery rented space in LaVista Plaza which was owned by Bellino, Bellino received monthly rental payments from Lottery.

Prior to their formation of Lottery, Anderson and Bellino were each involved in other businesses. Before Lottery commenced operation, a general manager was identified who would be responsible for the day-to-day activities of Lottery. The general manager hired and fired employees, purchased supplies, operated the keno game, and scheduled and supervised the employees. In addition to the general manager, Lottery hired keno managers, supervisors, and keno writers. Lottery also opened a lounge and a restaurant in conjunction with its keno operation. At some point, an additional manager was hired and put in charge of the day-to-day operations of both the lounge and the restaurant. If problems arose that could not be handled by the general manager or the general manager's staff, Anderson and Bellino were generally available. The district court found, and the record supports the finding, that

[t]here was no express agreement between Bellino and Anderson as to the amount of time that each would devote to the lottery business. To the contrary, their agreement, as even evidenced by the testimony of Bellino, was simply that each would participate as much as they [sic] could in the business and that the day-to-day operations of the business would be conducted by managers hired by Lottery.

Neb. Rev. Stat. § 9-646(3) (Reissue 1997) was amended in October 1993 to provide in part that "[n]o owner or officer of a lottery operator with whom the county, city, or village contracts to conduct its lottery shall play any lottery conducted by such county, city, or village." The Nebraska Department of Revenue brought administrative charges against Anderson relating to a December 1993 gambling incident. Anderson agreed to pay an administrative fine of \$4,500. As part of the stipulation of the settlement, the department agreed that the settlement would have no impact on Anderson's license to operate Lottery.

Subsequently to the award of the LaVista keno contract to Lottery, Anderson and Bellino became involved in other ventures, including a racetrack near Omaha, the I-80 Speedway. Anderson was a part owner from 1994 to 1996. Both Anderson and Bellino spent significant time from 1994 through 1996 operating the speedway. In addition, Bellino invited Anderson to bid with him for a Fremont keno contract. Eventually, Anderson and

his brother agreed to and became investors in a corporation that was awarded a Fremont keno contract. Along with Bellino, they were still investors in the Fremont venture as of April 2000.

From 1994 to 1998, Lottery employed general managers, keno managers, supervisors, and keno writers. Although Bellino and Anderson continued to be involved in Lottery, the evidence indicated that Bellino began to spend more time in the lounge of Lottery due, in part, to his personal relationship with Lottery's lounge manager. Anderson continued to be involved in the business to a lesser degree than Bellino. According to Lottery's bookkeeper, Anderson would come to the Lottery facilities at least once or twice a week in the mornings to review records and effect repairs. The bookkeeper testified that she talked to Anderson on a daily basis regarding Lottery's business. Bellino acknowledged in his testimony that he did not complain to Anderson about Anderson's degree of involvement in Lottery until approximately March 1998 and that Anderson never refused to do anything that Bellino asked him to do.

Shortly before Christmas 1997, Anderson met with Bellino and discussed with him the fact that Lottery's keno contract with LaVista was set to expire on July 31, 1998. Anderson advised Bellino that if the contract was not extended, Lottery would need to submit a new bid. Bellino told Anderson that he was aware the contract would expire in the summer and that he would meet with Anderson after the holidays to discuss Lottery's course of action.

On or about March 7, 1998, Anderson received a letter from Bellino, dated February 26, 1998, in which Bellino stated that he felt that he was doing a disproportionate amount of work for Lottery and receiving inadequate compensation. As a result, Bellino indicated he no longer intended to be associated with Lottery after the corporation's keno contract expired on July 31, 1998. As the owner of the premises where Lottery operated its keno parlor, Bellino also informed Anderson that Lottery would have to vacate the premises when the keno contract with the city of LaVista expired. Finally, Bellino informed Anderson that when the lottery contract comes "up for rebid, I will bid on it myself, either individually or through another entity which I will establish." At the time Bellino sent the February 26 letter, he

was Lottery's president, as well as a director and a 50-percent shareholder in the corporation.

After receiving the February 26, 1998, letter, Anderson attempted on several occasions to meet in person with Bellino to discuss the letter. Although the date is not clear in the record, some time prior to April 21, Anderson met with Bellino at the keno parlor. During that meeting, Anderson advised Bellino that he was unaware that Bellino thought he was doing more than his share of the work and Anderson expressed his willingness to try to resolve any concerns that Bellino had with Lottery or with Anderson. Following the meeting with Bellino, Anderson contacted an attorney regarding the situation with Bellino. In a letter dated April 21, 1998, the attorney informed Bellino that it was Lottery's belief that the keno contract with the city of LaVista was a corporate opportunity. The letter expressed Lottery's desire to have Bellino cooperate with Lottery in bidding for the new contract.

During the first quarter of 1998, Bellino met in person with LaVista's city administrator, Cara L. Pavlicek. During that meeting, Bellino inquired as to the city's intentions with regard to the keno contract when it expired in July. Pavlicek testified that she had several conversations with Bellino, all of which occurred while Bellino continued to be the president, a director, and a 50-percent shareholder of Lottery. Pavlicek testified that prior to her conversations with Bellino, she was not aware that the keno contract was due to expire in July 1998. Pavlicek testified that the city had been satisfied with the keno operation as conducted by Lottery. However, after her initial conversation with Bellino, Pavlicek reviewed the contract, discussed the city's options with the city attorney, and recommended to the city council that the keno contract be put up for competitive bid. Indeed, the agenda for the city council meeting of April 21, 1998, regarding the keno contract, states, "The current contractor has advised he is not interested in renewal of the contract with his existing business partnership. It is anticipated that the City will receive an independent proposal from Mr. Bellino."

On April 21, 1998, the LaVista City Council voted to accept Pavlicek's recommendation and put the keno contract up for bids. On April 23, Bellino incorporated Keno for the purpose of

bidding for the keno contract with the city of LaVista. Bellino was the sole shareholder of Keno.

On May 4, 1998, Bellino's attorney sent a letter to Anderson and Lottery, informing them that Bellino had no interest in trying to resolve matters with Lottery and would not bid for the contract as part of Lottery. In the letter, Bellino tendered his resignation as an officer and director of Lottery "effective upon termination of the corporation's current keno lottery contract with the City of LaVista." (Emphasis in original.)

Bellino prepared and submitted a bid on behalf of Keno for the keno contract. At the time Bellino incorporated Keno and prepared Keno's bid, Bellino remained an officer of Lottery, as well as a director and a 50-percent shareholder of Lottery. Because Bellino was still an officer, director, and shareholder of Lottery at the time the Lottery bid was submitted, Anderson requested that Bellino provide him with certain personal information required by the bid specifications from all persons associated with the bidder, which information Bellino supplied to Anderson. At the time it was bidding for the new keno contract, Lottery was in good financial condition.

Only the bids by Lottery and Keno were received by the city of LaVista. The city awarded the new keno contract to Keno. Bellino admitted during trial that he knew when he formed Keno and submitted a bid on its behalf for the keno contract that if he and his new company were awarded the contract, Lottery would be harmed. Bellino also acknowledged in his testimony that he knew that Anderson objected to Keno's bidding on the contract.

The new keno contract between LaVista and Keno was signed on July 24, 1998. Lottery ceased conducting its keno operations on August 18. Shortly after August 18, Keno opened its new keno parlor in the same location where Lottery had operated. Keno hired most of the employees previously employed by Lottery. Keno has continued to operate the keno parlor since being awarded the LaVista keno contract. Bellino has invested in improvements, and the district court found that the keno parlor has continued to be successful, with gross revenues increasing in 1998 and 1999.

The evidence from the accounting trial shows that Bellino owns 100 percent of the issued and outstanding shares of Keno.

Since it began operations, Keno has paid Bellino a salary at a rate of \$120,000 per year. As of December 31, 2000, Bellino had received salary payments totaling \$211,199 and was due accrued but unpaid salary in the amount of \$61,318.

On July 29, 1998, Anderson and Lottery filed suit against Bellino and Keno. In their petition, Anderson and Lottery alleged, *inter alia*, that Bellino had breached a fiduciary duty he owed to Lottery as an officer, director, and shareholder of Lottery by forming Keno and bidding on the LaVista keno contract. Anderson and Lottery alleged that Bellino had diverted a corporate opportunity and directed the opportunity to Keno. As a remedy, Anderson and Lottery sought the imposition of a constructive trust on Keno's business operations for the benefit of Anderson and Lottery.

In their amended answer and counterclaim filed on December 17, 1998, Bellino and Keno, *inter alia*, denied that Bellino had breached any fiduciary duty which Bellino owed to Lottery and further denied that Bellino had misappropriated a corporate opportunity belonging to Lottery. Bellino also claimed that he was entitled to "offset" any amounts claimed by Anderson and Lottery against the "reasonable value of Bellino's services provided to . . . Lottery."

For his counterclaim, Bellino alleged two "causes of action." For his first cause of action, entitled "Quantum Meruit," Bellino claimed that he was due in excess of \$480,000 from Lottery for services he had provided to Lottery. For his second cause of action, entitled "Breach of Contract," Bellino alleged that he and Anderson had an oral agreement to contribute their services equally to Lottery and that Anderson had breached this agreement. Bellino sought damages in excess of \$480,000 as a result of Anderson's purported breach.

As stated above, trial in this case was bifurcated. The record consists of over 900 pages of testimony and approximately 100 documentary exhibits. A total of 20 witnesses testified in person or by deposition. The liability phase of the case was tried on April 4 through 6, 2000. In an order filed May 9, the district court concluded that Bellino and Keno had obtained the LaVista lottery contract in breach of Bellino's fiduciary duty to Lottery and that the appropriate remedy for Bellino's breach was the imposition of a constructive trust for the benefit of Anderson and Lottery. The

district court ordered that a subsequent hearing be held in connection with the accounting for the trust. The district court concluded that Bellino's claim for a setoff and his two-count counterclaim were without merit and dismissed these claims.

The accounting phase of the trial was held on February 1 and 2, 2001. The accounting evidence relative to the issues on appeal is supplied as necessary in our analysis of the assignments of error. In an order filed May 9, 2001, the district court, *inter alia*, ordered Bellino to pay Anderson and Lottery \$644,992.63, representing various items including "rents, profits and benefits resulting from Keno and Bellino receiving the keno contract from the city of LaVista." The May 9 order also provided that Bellino could receive a credit of \$172,514.63 against the judgment, an amount equal to Bellino's shareholder's equity in Keno, if Bellino could transfer the stock of Keno to Lottery and persuade LaVista to relicense the keno contract from Keno in favor of Lottery. In this connection, the district court indicated in its May 9 order that the transfer of stock occur within 60 days of the date of the order, but that in the event such a transfer could not be complied with "for any reason," Bellino and Keno were ordered to hold Keno's interest in the keno contract in a constructive trust for the benefit of Anderson and Lottery. Bellino and Keno appeal the district court's orders to the extent such orders granted relief to Anderson and Lottery. Bellino does not appeal the district court's order denying his claim for a setoff and dismissing his counterclaim.

III. ASSIGNMENTS OF ERROR

On appeal, Bellino and Keno assign nine errors, which we restate as four. Bellino and Keno claim, restated, that the district court erred (1) in finding the existence of a corporate opportunity and in further finding that Bellino had breached his fiduciary duty to Lottery by diverting such corporate opportunity belonging to Lottery, (2) in imposing a constructive trust, (3) in ordering Bellino and Keno to transfer the keno contract and all of Keno's stock to Lottery, and (4) in its accounting for the constructive trust.

IV. STANDARDS OF REVIEW

[1,2] An action to impose a constructive trust sounds in equity. *Manker v. Manker*, 263 Neb. 944, 644 N.W.2d 522 (2002);

ProData Computer Servs. v. Ponec, 256 Neb. 228, 590 N.W.2d 176 (1999). In an appeal of an equitable action, an appellate court tries factual questions de novo on the record, provided that when credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Burk v. Demaray*, 264 Neb. 257, 646 N.W.2d 635 (2002).

V. ANALYSIS

1. CORPORATE OPPORTUNITY AND BREACH OF FIDUCIARY DUTY

Bellino and Keno contend that the district court erred when it determined that the 1998 keno contract with the city of LaVista was a corporate opportunity for Lottery and that by diverting such opportunity from Lottery to Keno, Bellino breached his fiduciary duty of “utmost good faith and loyalty” to Lottery. There is no dispute among the parties that at the time Bellino, on behalf of Keno, bid for the LaVista keno contract, he was an officer of Lottery, a member of Lottery’s board of directors, and a 50-percent shareholder of Lottery. There is no dispute that Bellino continued to be a member of the Lottery board of directors at the time the contract was awarded to Keno. Bellino and Keno do not dispute that as a director, Bellino owed a fiduciary duty to Lottery. Bellino and Keno claim, however, that no corporate opportunity existed. Bellino and Keno further claim that if a corporate opportunity existed, it was limited to the opportunity to bid for the 1998 keno contract, that Bellino did nothing to impede Lottery from bidding for the 1998 keno contract by merely submitting a competing bid, and that, therefore, Bellino did not usurp a corporate opportunity. In addition, Bellino and Keno claim that in the absence of a noncompete agreement, Bellino was free to compete with Lottery for the keno contract and did not breach his fiduciary duty to Lottery. We reject the arguments of Bellino and Keno.

(a) Corporate Opportunity

[3] Bellino and Keno argue that Lottery had no expectancy in the 1998 keno contract and that, therefore, no corporate

opportunity existed. They further argue that if a corporate opportunity existed, then the opportunity was limited to the opportunity "to bid" for the keno contract. Brief for appellant at 27. We have previously stated that "in order to be a corporate opportunity, the business must generally be one of practical advantage to the corporation and must fit into and further an established corporate policy." *Anderson v. Clemens Mobile Homes*, 214 Neb. 283, 289, 333 N.W.2d 900, 905 (1983). The facts demonstrate that the business for which Lottery was bidding in 1998 was the business of operating a keno parlor for the city of LaVista pursuant to a contract issued by the city, the same business in which Lottery had been engaged for the previous 9 years and the purpose for which Lottery was incorporated. Bellino admitted that if Lottery were not awarded the keno contract, the corporation would be harmed. Contrary to the arguments asserted by Bellino and Keno, the corporate opportunity was not the right to bid; the bidding process was merely the "preliminary step" by which Lottery sought to acquire the opportunity embodied in the award of the keno contract. See *Nebraska Power Co. v. Koenig*, 93 Neb. 68, 78, 139 N.W. 839, 843 (1913). The record shows that the keno contract would have served as a "practical advantage" to Lottery and would have "fit into and further[ed] an established corporate policy." See *Anderson*, 214 Neb. at 289, 333 N.W.2d at 905. The facts thus establish that the 1998 keno contract was a corporate opportunity for Lottery.

(b) Breach of Fiduciary Duty

[4] In considering the claim asserted by Bellino and Keno regarding the fiduciary duty a director owes the corporation, we are guided by our previous decisions. In *Koenig*, 93 Neb. at 75, 139 N.W. at 841-42, we long ago described a corporate director's fiduciary duty to the corporation as follows:

"The rule is thoroughly embedded in the general jurisprudence of . . . America . . . that the status of directors is such that they occupy a fiduciary relation toward the corporation and its stockholders, and are treated by courts of equity as trustees. Courts hold the directors of a corporation to the strictest accountability. Conduct inconsistent with any duty

is condemned. The fiduciary relation is so vital that directors are not only prohibited from making profit out of corporate contracts, and from dealing with the corporation except upon the most open and on the fairest terms, but the rule of accountability is so strict that they are not permitted to anticipate the corporation in the acquisition of property reasonably necessary for carrying out the corporate purposes or conducting the corporate business.” 2 Thompson, Corporations (2d ed.) secs. 1215, 1246.

When discussing a corporate officer or director’s fiduciary duty to the corporation, we have also stated:

[A]lthough an officer or a director of a corporation is not necessarily precluded from entering into a separate business because it is in competition with the corporation, his fiduciary relationship to the corporation and its stockholders is such that if he does so he must prove . . . that he did so in good faith and did not act in such a manner as to cause or contribute to the injury or damage of the corporation, or deprive it of business; if he fails in this . . . proof, there has been a breach of that fiduciary trust or relationship. . . . The general rule is stated to be that a director or other corporate officer cannot acquire an interest adverse to that of the corporation while acting for the corporation or when dealing individually with third persons. 3 W. Fletcher, Cyclopedia of the Law of Private Corporations § 861 (rev. perm. ed. 1975).

Anderson v. Clemens Mobile Homes, 214 Neb. 283, 288, 333 N.W.2d 900, 904 (1983).

Bellino and Keno claim that because Bellino did nothing to impede Lottery from bidding for the keno contract and cooperated with Anderson when Lottery prepared its bid for the keno contract, Bellino satisfied his fiduciary duty to Lottery. This argument ignores, however, that Bellino’s bid through Keno for the keno contract, was “an act of distinct hostility” to Lottery. See *Koenig*, 93 Neb. at 74, 139 N.W. at 841. Bellino’s actions and ultimately Keno’s bid created a contest which, if Keno were successful, would necessarily deprive Lottery of business and damage Lottery. See *Anderson*, *supra*. As a director, Bellino’s fiduciary duty was to procure the keno contract for Lottery and to forbear from obtaining it for his exclusive benefit. See *Koenig*, *supra*.

Bellino argues that he acquitted his fiduciary responsibilities to Lottery by cooperating with Lottery in the preparation of its keno contract bid. We do not accept this argument. The record shows that Bellino's cooperation, consisting of providing personal financial data to Anderson to be included in Lottery's bid documents and attending the meeting with LaVista officials when Lottery's bid was discussed, was of little consequence and were eclipsed by Bellino's acts which were antagonistic to Lottery.

[5] Additionally, Bellino cannot successfully claim that he was free to submit a bid on behalf of his own corporation against Lottery simply because he had not signed a noncompete agreement. The absence of a noncompete agreement is of no significance in the context of this case. Under the law, a corporate director may not compete with the corporation if the director's competition "cause[s] or contribute[s] to the injury or damage of the corporation, or deprive[s] it of business." *Anderson v. Clemens Mobile Homes*, 214 Neb. 283, 288, 333 N.W.2d 900, 904 (1983). The evidence is uncontroverted that Bellino's successful bid for the LaVista keno contract deprived Lottery of its only source of business. Thus, under the law governing the fiduciary duty of corporate directors and given the facts of this case, Bellino, through Keno, should not have competed with Lottery for the LaVista keno contract.

[6] As a director of Lottery, Bellino occupied a fiduciary relationship toward the corporation. "The general rule is . . . that a director . . . cannot acquire an interest adverse to that of the corporation . . . when dealing individually with third persons." *I. P. Homeowners v. Radtke*, 5 Neb. App. 271, 283, 558 N.W.2d 582, 590 (1997). By submitting a bid on behalf of Keno for the city of LaVista's keno contract, Bellino acted in a manner directly adverse to Lottery's interests and contrary to his duty as a fiduciary of Lottery. Based upon our de novo review of the record, we conclude that the district court did not err when it determined that Bellino had breached his fiduciary duty of "utmost good faith and loyalty" which he owed to Lottery by usurping a corporate opportunity belonging to Lottery. Accordingly, we conclude there is no merit to Bellino and Keno's assignments of error regarding corporate opportunity and breach of fiduciary duty.

2. IMPOSITION OF CONSTRUCTIVE TRUST

Bellino and Keno contend that the district court erred when it imposed a constructive trust against Keno and ordered that Keno hold its interest in the LaVista keno contract for the benefit of Anderson and Lottery. We conclude that on the facts of this case, the district court did not err in imposing a constructive trust.

[7-9] A constructive trust is a relationship, with respect to property, subjecting the person who holds title to the property to an equitable duty to convey it to another on the ground that his or her acquisition or retention of the property would constitute unjust enrichment. *Manker v. Manker*, 263 Neb. 944, 644 N.W.2d 522 (2002); *ProData Computer Servs. v. Ponec*, 256 Neb. 228, 590 N.W.2d 176 (1999). We have stated:

A constructive trust may arise by operation of law where legal title is acquired by virtue of a confidential relationship between the grantor and the grantee and under such circumstances that the grantee ought not, according to the rules of equity and good conscience, hold the benefits. Where such circumstances exist, a court of equity will raise a trust by construction and convert the grantee into a trustee of the legal title.

Fleury v. Chrisman, 200 Neb. 584, 588-89, 264 N.W.2d 839, 842 (1978). Intangible property and liquid assets such as stocks and bank and investment accounts may be held subject to a constructive trust. *Manker, supra*; *ProData Computer Servs., supra*. Regardless of the nature of the property upon which the constructive trust is imposed, a plaintiff seeking to establish the trust must prove by clear and convincing evidence that the individual holding the property obtained title to it by fraud, misrepresentation, or an abuse of an influential or confidential relationship and that under the circumstances, such individual should not, according to the rules of equity and good conscience, hold and enjoy the property so obtained. *Id.*

[10,11] We have recognized that where “a situation exists which is contrary to the principles of equity and which can be redressed within the scope of judicial action, a court of equity will devise a remedy to meet the situation.” *Anderson v. Clemens Mobile Homes*, 214 Neb. 283, 287, 333 N.W.2d 900, 904 (1983). Furthermore, the “traditional remedy imposed by courts upon a

finding of a misappropriation of a corporate opportunity is the impression of a constructive trust in favor of the corporation upon the property.” See *I. P. Homeowners v. Radtke*, 5 Neb. App. 271, 284, 558 N.W.2d 582, 590 (1997) (citing 3 William M. Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* § 861.50 (rev. perm. ed. 1994)). See, generally, *Nebraska Power Co. v. Koenig*, 93 Neb. 68, 139 N.W. 839 (1913) (imposing constructive trust in favor of corporation when application to divert river for hydroelectric plant was filed by corporate director on his own behalf).

Upon our de novo review of the facts and having concluded that Bellino breached his fiduciary duty to Lottery by submitting a bid and gaining the LaVista keno contract on behalf of Keno to the detriment of Lottery, we conclude that the district court did not err in imposing a constructive trust against Keno for the benefit of Lottery.

3. TRANSFER OF KENO STOCK TO LOTTERY

Following the accounting phase of the trial, the district court entered an order providing for alternative forms of relief. In one portion of the order, the district court directed Bellino and Keno to transfer all of Keno’s stock to Lottery and to take steps to obtain licensing approval of Lottery from LaVista for the purpose of reassigning the contested keno contract from Keno to Lottery. If the stock transfer and relicensing were accomplished, Bellino and Keno would receive a credit against the judgment. The order further provided that if such steps could not be accomplished “for any reason,” a constructive trust would be imposed in lieu of such relief. Under the constructive trust, Bellino and Keno would hold Keno’s interest in the keno contract as trustees in favor of Anderson and Lottery. On appeal, Bellino and Keno argue that the district court erred in ordering the stock transfer and relicensing because such relief is impossible for a variety of reasons.

[12] The record in this case does not permit us to comment on this assignment of error, nor are we required to do so. Whether the transfer of stock, even if permissible, would be accompanied by the relicensing of the keno contract from Keno to Lottery by the city is speculative. Even if Bellino and Keno were correct that this portion of the order cannot be complied with, the relief

of a constructive trust remains available and has been approved by this court elsewhere in this opinion. Having concluded that the imposition of a constructive trust is an appropriate remedy, we need not consider the claim asserted by Bellino and Keno relative to the hypothetical alternative remedy. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it. *Rush v. Wilder*, 263 Neb. 910, 644 N.W.2d 151 (2002). See *In re Estate of Reading*, 261 Neb. 897, 626 N.W.2d 595 (2001).

4. ACCOUNTING FOR CONSTRUCTIVE TRUST

Following the accounting phase of the trial, and in the absence of the potential credit for \$172,514.63, the district court entered judgment in favor of Anderson and Lottery in the amount of \$644,992.63.

Bellino and Keno claim the district court erred in various respects in its accounting for the constructive trust, including relying on inadmissible testimony by the witness Dennis Hein, requiring Bellino to reimburse Lottery for compensation he received from Keno, refusing to allow Bellino and Keno a “credit” for various “expenses” allegedly incurred during Keno’s operation, and ordering the payment of other items denominated by Bellino and Keno as “attorneys’ fees” and “interest.” We reject the arguments asserted by Bellino and Keno regarding these claimed errors.

[13] The purpose of an accounting “is to adjust the accounts of the parties and render complete justice.” 1A C.J.S. *Accounting* § 38 b. at 35 (1985). In the instant case, the district court imposed a constructive trust upon Keno, requiring Keno to hold the LaVista keno contract for the benefit of Lottery. Once the district court determined that Keno would be held in a constructive trust for the benefit of Lottery, it was necessary to have an accounting and properly determine the corpus of the trust. In the accounting, the district court examined the expenses and revenue of Keno. When the district court determined that an expense was reasonably incurred by Keno, such as Keno’s lease payment for the space it rented to operate the keno parlor, it approved the expense as the ordinary cost of doing business. If, however, during the accounting, the district court determined that an expense incurred by Keno was unusual or unjustified, such sum had to be repaid to

avoid an improper reduction in the trust corpus to the detriment of Lottery, which had become the beneficiary of the trust. In this regard, the district court determined that several expenses incurred by Keno were inequitably paid to or for the benefit of Bellino, and Bellino and Keno take issue with such determinations on appeal.

[14,15] In the theory of unjust enrichment, a constructive trustee may be compelled to convey or assign the corpus of a trust property and to account for and pay over rents, profits, issues, and income which the constructive trustee has actually received or, in general, which he or she might by exercise of reasonable care and diligence have received. *Ryan v. Plath*, 18 Wash. 2d 839, 140 P.2d 968 (1943) (cited with approval in *I. P. Homeowners v. Radtke*, 5 Neb. App. 271, 558 N.W.2d 582 (1997)). Generally, a trustee, including a constructive trustee, may be reimbursed or indemnified for expenses incurred or advances made in the execution of the trust, so long as the expenses or advances are considered proper in the administration of the trust. See, generally, 76 Am. Jur. 2d *Trusts* § 628 (1992); 90 C.J.S. *Trusts* § 471 (1955). The party seeking reimbursement bears the burden of demonstrating the appropriateness of the expenses. *I. P. Homeowners, supra*. When considering the expenses incurred by a constructive trustee, we articulated the rule that “any advantage beyond proper expenses and compensation belongs to the *cestui que trust*.” *Nebraska Power Co. v. Koenig*, 93 Neb. 68, 77, 139 N.W. 839, 842 (1913). We have stated that “[t]o rule otherwise would permit wrongdoers to be unjustly enriched or otherwise benefit parties who have obtained property with actual or constructive knowledge of [their improper] actions . . . in acquiring the property.” *City of Hastings v. Jerry Spady Pontiac-Cadillac, Inc.*, 212 Neb. 137, 144-45, 322 N.W.2d 369, 373 (1982).

[16] As a threshold matter, Bellino and Keno claim that the testimony of Hein, an accountant, called as a witness by Anderson and Lottery, should have been excluded as irrelevant and that the district court erred in relying on this inadmissible testimony in performing its accounting. Our review of the record shows that Hein primarily testified concerning Keno’s income and expenses and that his testimony was based upon financial documents produced by Keno. Financial documents, including Keno’s general

ledgers and financial statements, were admitted into evidence without objection by Bellino and Keno. We have previously recognized that the admission of evidence which is “primarily duplicative” of other evidence admitted into the record is not reversible error. See, generally, *State v. Bradley*, 236 Neb. 371, 390, 461 N.W.2d 524, 538 (1990) (*cert. denied* 502 U.S. 846, 112 S. Ct. 143, 116 L. Ed. 2d 109 (1991)).

Bellino and Keno also claim that Hein’s testimony went to money “damages” and that such damages are not available in this case. Brief for appellant at 36. We do not accept the characterization placed on Hein’s testimony by Bellino and Keno. Our review of the record shows that Hein testified as to the nature and extent of Keno’s expenses and compared those expenses to Lottery’s expenses when it operated the LaVista keno parlor. Such testimony is relevant to an accounting action, where the goal of an accounting for a constructive trust is to identify “any advantage beyond proper expenses and compensation [which advantage] belongs to the [constructive trust].” See *Koenig*, 93 Neb. at 77, 139 N.W. at 842. Based upon our de novo review of the record, see *Burk v. Demaray*, 264 Neb. 257, 646 N.W.2d 635 (2002), we conclude that Hein did not opine on “damages,” but instead provided calculations from which the district court could determine, based on application of the law, what expenses paid by Keno or benefits received by Bellino improperly diminished Keno.

Finally, we note that to the extent Bellino and Keno object to the relevance of Hein’s testimony concerning the nature of Keno’s expenses and also object to documents Hein prepared summarizing his review of those expenses and comparing the same to Lottery’s expenses in order to determine those amounts he concluded were unnecessary or unreasonable, Bellino and Keno elicited similar evidence during their cross-examination of Hein. Indeed, Bellino and Keno introduced into evidence, through Hein, albeit with limitations, their own exhibit summarizing Hein’s calculations concerning Keno’s expenses in comparison to Lottery’s expenses. See, generally, *In re Interest of Kelley D. & Heather D.*, 256 Neb. 465, 590 N.W.2d 392 (1999). See, also, *Pauley Lumber Co. v. City of Nebraska City*, 190 Neb. 94, 206 N.W.2d 326 (1973). In sum, the district court did not commit reversible error by admitting Hein’s testimony.

Turning to the results of the accounting, under our *de novo* review of the record, we conclude that the district court did not err in its accounting for the constructive trust, and we recite below some, but not all, of the items in the accounting which form the basis of our approval of the district court's order. In conducting our review of the accounting, we are mindful that following the imposition of the constructive trust of Keno for the benefit of Lottery, on the record before us, it appears that Bellino, as a 50-percent shareholder of Lottery, will share in the benefit from Lottery's status as beneficiary.

Among its specific orders, the district court directed that the salary which Bellino received from Keno in the approximate amount of \$211,000 be repaid. The court likewise ruled that "management fees" and fees Bellino received for supervising remodeling work for Keno be refunded. The court reasoned that Bellino had not received a salary or management fees from Lottery, despite performing similar tasks for that corporation, and to allow him to keep these sums would diminish Keno and amount to Bellino's benefiting from the breach of his fiduciary duty. The district court also determined that the interest Bellino charged Keno on a loan he made to the corporation was not reasonable. We agree with the district court that paying these various expenses amounted to a benefit to Bellino as a result of his breach of fiduciary duty.

Similarly, the district court scrutinized the purported expenses incurred by Keno during its operation of the keno parlor. To the extent that the district court determined that the expenses were unique to Keno, such as the approximately \$34,000 in salary paid to Bellino's wife or the \$35,000 paid to "'sponsor'" a race car belonging to Bellino's son, or were amounts that would not have been incurred if Keno had not competed for the keno contract, such as Keno's attorney and accountant fees, the district court ordered Bellino to pay such amounts. We find no error in such order.

As for other, potentially legitimate expenses, such as bills for a cellular telephone, office supplies, or postage purportedly incurred by Keno, the district court properly found an insufficient relationship between these expenses and Keno. For example, Bellino admitted in his testimony that he used postage for his

personal business as well as for the other businesses he operated, but he was unable to allocate a portion of the postage bill to Keno's operations.

Bellino and Keno claim that the district court erred in ordering them to pay Anderson and Lottery's attorney fees and interest on the judgment. We do not find language in the court's order directing that these items be paid by Bellino and Keno. We do note language in the order directing Lottery, upon receipt of money from Keno, "to first repay to Anderson all expenses, if any, actually incurred by him in pursuing this action on Lottery's behalf." Such language directs Lottery, not Bellino and Keno, to reimburse Anderson for litigation expenses.

Bellino and Keno further claim that the district court improperly awarded "prejudgment interest." We see no merit to this assertion. The district court determined that Keno borrowed money to fund its operations at the same time it was making payments to or for the benefit of Bellino. The district court further found that money taken from Keno by or on behalf of Bellino "caused Keno to incur unnecessary interest expenses total[ing] \$40,006." The district court ordered Bellino to pay the \$40,006. The characterization of this payment as "prejudgment interest" by Bellino and Keno is not accurate. The district court determined that as a result of Bellino's receipt of compensation and other unreasonable financial benefits, Keno was forced to borrow money, and that had Keno not been forced to borrow money, it would not have had to pay interest. This order was appropriate in an accounting for a constructive trust. See *Nebraska Power Co. v. Koenig*, 93 Neb. 68, 139 N.W. 839 (1913).

In view of the record, the assignments of error regarding the accounting are without merit. Based on our de novo review of the record, we conclude that the district court did not err in its accounting for the constructive trust.

VI. CONCLUSION

For the reasons stated herein, and based upon our de novo review of the record, we conclude that Bellino, as a director of Lottery, breached the fiduciary duty he owed Lottery when he caused Keno to bid against Lottery for the LaVista keno contract. We affirm the district court's order imposing a constructive trust

upon Keno for the benefit of Anderson and Lottery as a result of Bellino's breach of fiduciary duty. We also affirm the district court's order which provided an accounting for the constructive trust and entered judgment in the amount of \$644,992.63.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
ARTHUR LEE GALES, JR., APPELLANT.
658 N.W.2d 604

Filed March 28, 2003. No. S-01-1231.

1. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the trial court.
2. **Constitutional Law: Sentences: Death Penalty.** In order for a capital sentencing scheme to comply with the Eighth Amendment to the U.S. Constitution, it must perform a narrowing function with respect to the class of persons eligible for the death penalty and must also ensure that capital sentencing decisions rest upon an individualized inquiry.
3. **Criminal Law: Due Process: Proof.** Due process of law requires the prosecution to prove beyond a reasonable doubt every fact necessary to constitute the crime charged.
4. **Criminal Law: Sentences: Prior Convictions: Juries: Proof.** Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.
5. **Criminal Law: Sentences: Appeal and Error.** During the pendency of an appeal in a criminal case, the execution of the sentence or judgment shall be suspended until such time as the appeal has been determined.
6. **Sentences: Final Orders: Appeal and Error.** A sentence is not a final judgment until the entry of a final mandate of an appellate court.
7. **Constitutional Law: States: Appeal and Error.** New constitutional rules apply to all state or federal cases which are pending on direct review or are not yet final when the rule is announced.
8. **Constitutional Law: Death Penalty: Juries.** It is the determination of "death eligibility" which exposes the defendant to greater punishment, and such exposure triggers the Sixth Amendment right to jury determination as delineated in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).
9. **Statutes: Time.** Statutes covering substantive matters in effect at the time of a transaction govern, not later-enacted statutes. However, the procedures and procedural rules to be applied are those which are in effect at the date of the hearing or proceeding, and not those in effect when the act or violation allegedly took place.

10. **Statutes: Constitutional Law: Sentences.** Both U.S. Const. art. I, § 10, and Neb. Const. art. I, § 16, provide that no ex post facto law may be passed. A law which purports to apply to events that occurred before the law's enactment, and which disadvantages a defendant by creating or enhancing penalties that did not exist when the offense was committed, is an ex post facto law and will not be endorsed by the courts.
11. **Statutes: Legislature: Intent: Presumptions.** If, in a subsequent amendment on the same or similar subject, the Legislature uses different terms in the same connection, a court interpreting the subsequent enactment must presume that the Legislature intended a change in the law.
12. **Statutes: Constitutional Law: Legislature: Intent: Appeal and Error.** To determine whether an unconstitutional portion of a statute may be severed, an appellate court considers (1) whether a workable statutory scheme remains without the unconstitutional portion, (2) whether valid portions of the statute can be enforced independently, (3) whether the invalid portion was the inducement to passage of the statute, (4) whether severing the invalid portion will do violence to the intent of the Legislature, and (5) whether the statute contains a declaration of severability indicating that the Legislature would have enacted the bill without the invalid portion.
13. **Statutes: Time.** While procedural statutes do apply to pending litigation, it is a general proposition of law that new procedural statutes have no retroactive effect upon any steps that may have been taken in an action before such statutes were effective. All things performed and completed under the old law must stand.

Appeal from the District Court for Douglas County: GERALD E. MORAN, Judge. Affirmed in part, and in part vacated and remanded with directions for new penalty phase hearing and resentencing on counts I and II.

J. William Gallup, of Gallup & Schaefer, for appellant.

Jon Bruning, Attorney General, J. Kirk Brown, and, on brief, Don Stenberg, former Attorney General, for appellee.

Denise E. Frost and Clarence E. Mock III, of Johnson & Mock, for amicus curiae American Civil Liberties Union Nebraska Foundation, Inc.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, McCORMACK, and MILLER-LEMAN, JJ.

PER CURIAM.

I. INTRODUCTION

After a jury found Arthur Lee Gales, Jr., guilty of two counts of first degree murder and one count of attempted second degree murder, the trial judge conducted a sentencing hearing, made

factual findings, and sentenced Gales to death on each count of first degree murder and to not less than 50 nor more than 50 years' imprisonment on the count of attempted second degree murder. This is an automatic direct appeal from the death sentences as required by Neb. Rev. Stat. § 29-2525 (Cum. Supp. 2002). During the pendency of the appeal, but before it was briefed and argued, the U.S. Supreme Court decided *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), in which it held that a defendant in a capital case has a Sixth Amendment right to a jury determination of certain factual issues which determine whether a death sentence may be imposed. Subsequent to oral argument and submission of this appeal, the Nebraska Legislature enacted amendments to Nebraska's capital sentencing statutes in response to *Ring*. This case presents our first opportunity to assess the impact of *Ring* on Nebraska's capital sentencing statutes and to determine the applicability of the recent amendments to those statutes.

II. FACTS AND PROCEDURAL HISTORY

A three-count information was filed against Gales on May 22, 2001. Count I charged Gales with first degree murder based on an allegation that on or about November 12, 2000, he purposely and with deliberate and premeditated malice or during the perpetration of a first degree sexual assault killed Latara Chandler (Latara). Count II charged first degree murder based upon an allegation that on or about November 12, Gales purposely and with deliberate and premeditated malice killed Tramar Chandler (Tramar). Count III charged Gales with attempted second degree murder, alleging that on or about November 12, he intentionally, but without premeditation, attempted to kill Judy Chandler (Chandler). Gales entered pleas of not guilty to all charges.

A jury trial commenced on August 20, 2001. Evidence received at trial revealed that Gales was present with Chandler and her children, Latara and Tramar, at Chandler's apartment in Omaha, Nebraska, between 10 and 11 p.m. on November 11, 2000. On the following morning, Chandler was found badly beaten and incoherent near 15th and Grace Streets in Omaha. After Chandler was identified, police learned that she had children. At approximately 5:30 p.m. on November 12, police entered Chandler's apartment

to check on the children and discovered 13-year-old Latara's body, nude from the waist down, in a bedroom. Seven-year-old Tramar's body was found with his torso positioned face up in the bathtub and his legs outside the bathtub. Autopsies revealed that Latara died as a result of manual strangulation and that Tramar died as a result of drowning and manual strangulation. The examining pathologist testified that each child had been subjected to at least 4 minutes of continuous compression of the neck before death. Latara had been sexually assaulted. The pathologist could not pinpoint the exact time of death for either child.

The State's theory at trial was that Gales and Chandler left Chandler's children at her apartment on the evening of November 11, 2000, and subsequently became involved in an altercation in which Gales severely beat Chandler and left her for dead. The State contended that Gales realized the children were witnesses who could place him with Chandler that evening and that he therefore returned to the apartment and killed them. Gales did not testify or offer evidence at trial and did not dispute the State's general theory of how the deaths of the children occurred. His defense was that he was not the person who assaulted Chandler and killed the children. The State presented DNA evidence which linked Gales to both crime scenes and excluded other potential suspects.

On August 27, 2001, the jury returned a verdict finding Gales guilty of two counts of first degree murder and one count of attempted second degree murder. On August 28, the district court entered an "Order of Judgment of Conviction," in which it accepted the verdict of the jury and adjudged Gales guilty on all three counts. The court scheduled a sentencing hearing for October 23.

Subsequently to entry of the judgment of conviction and prior to the sentencing hearing, Gales filed a motion challenging the constitutionality of the Nebraska capital sentencing statutes. He asserted that "[p]ursuant to *Jones v. United States*, 526 U.S. 227[, 119 S. Ct. 1215, 143 L. Ed. 2d 311] (1999) and *Apprendi v. New Jersey*, [530] U.S. [466], 120 S. Ct. 2348[, 147 L. Ed. 2d 435] (2000), the Defendant is entitled to a new trial for jury determination of sentence." In the alternative, Gales sought a new trial "for Jury determination of statutory aggravating and

mitigating circumstances.” This motion was heard at the commencement of the sentencing hearing and overruled. At the same time, the court overruled a defense motion to convene a three-judge sentencing panel.

The sentencing hearing was conducted by the judge who presided at Gales’ trial. On November 6, 2001, Gales appeared before the court for the imposition of sentence. The court issued a written order of sentence on that date in which it found that certain statutory aggravating circumstances existed. First, the court found that Gales was previously convicted of another crime involving the use or threat of violence to a person, the aggravating circumstance enumerated in Neb. Rev. Stat. § 29-2523(1)(a) (Cum. Supp. 2002), because Gales had prior convictions for armed sexual battery and strong-armed robbery. The court found this aggravating circumstance applicable to both counts of first degree murder.

Second, the court found that Gales committed the murders of both children in an effort to conceal his identity as the perpetrator of the attempted murder of Chandler, thus meeting aggravating circumstance § 29-2523(1)(b). Relying upon evidence produced at trial, the court concluded that Gales assaulted Chandler, left her for dead, and then returned to the apartment to kill the children because they were witnesses.

Third, the court found that the murder of Latara was “especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence,” so that aggravating circumstance § 29-2523(1)(d) was met. Relying upon evidence produced at trial, the court concluded that the sexual abuse inflicted upon Latara prior to her death combined with the manual strangulation were sufficient to satisfy this aggravator. The court concluded that this aggravating circumstance was not met as to the death of Tramar.

Finally, the court found that aggravating circumstance § 29-2523(1)(e), “[a]t the time the murder was committed, the offender also committed another murder,” was applicable to the deaths of both children. Relying upon evidence received at trial, the court found that Gales was present in Chandler’s apartment at 11 p.m. on November 11, 2000. The court further found that Gales was the man who witnesses indicated was inside the

apartment at 4 a.m. on November 12. Reasoning that no one reported seeing or hearing from the children after 11 p.m. on November 11, the court found that the children were murdered some time during the early morning hours of November 12.

In addressing mitigating circumstances, the court determined that no evidence supported a finding of any statutory mitigator. The court found evidence to support a nonstatutory mitigator that Gales maintained a strong relationship with his family. In balancing the aggravating and mitigating circumstances, the court concluded that the one mitigator did not approach or exceed the aggravators in either murder. The court then considered whether a sentence of death in either murder was excessive or disproportionate to the penalty imposed in similar cases and concluded that it was not. Accordingly, the court imposed consecutive sentences of death on each count of first degree murder and a sentence of imprisonment for a period of not less than 50 nor more than 50 years on the count of attempted second degree murder.

III. ASSIGNMENT OF ERROR

Gales' sole assignment of error is that the district court "erred in denying appellant's motions challenging the constitutionality of Nebraska Revised Statute Section 29-2519 (1995) et seq. and requesting a jury determination of sentencing issues." He assigns no error with respect to the jury's determination of guilt on the two counts of first degree murder, or with respect to his conviction and sentence on the one count of attempted second degree murder.

IV. STANDARD OF REVIEW

[1] Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the trial court. *State v. Gamez-Lira*, 264 Neb. 96, 645 N.W.2d 562 (2002); *State v. Turner*, 263 Neb. 896, 644 N.W.2d 147 (2002).

V. ANALYSIS

1. BACKGROUND

The Sixth Amendment to the U.S. Constitution guarantees the right to "public trial, by an impartial jury" in criminal prosecutions. The Eighth Amendment to the U.S. Constitution forbids

the infliction of “cruel and unusual punishments.” Both are made applicable to the states through the 14th Amendment. See, *Porter v. Nussle*, 534 U.S. 516, 122 S. Ct. 983, 152 L. Ed. 2d 12 (2002) (Eighth amendment); *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) (Sixth amendment). The recent decision of the U.S. Supreme Court in *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), marks the convergence of two lines of federal constitutional authority: one addressing procedures which states must follow in order to implement capital punishment in conformity with the Eighth Amendment, and the other dealing with the extent to which the Sixth Amendment guarantees a right to a jury determination of the existence of facts which increase the penalty for a crime. Because the parties dispute the scope of the Court’s holding in *Ring*, we begin our analysis by examining its jurisprudential underpinnings.

(a) Eighth Amendment Capital Sentencing Requirements

“Murder in the first degree” was first defined as a separate offense in Nebraska in 1873. Gen. Stat., ch. 2, § 3, p. 720 (1873). It was made punishable by death. 2 Comp. Laws, ch. 2, § 3, p. 647 (1866-77); Consol. Stat., ch. 1, § 5579, p. 1123 (1891); *Sundahl v. State*, 154 Neb. 550, 48 N.W.2d 689 (1951). In 1893, the Legislature amended the law to provide that a person convicted of first degree murder “shall suffer death or shall be imprisoned in the penitentiary during life, in the discretion of the jury.” 1893 Gen. Laws, ch. 44, § 1, p. 386, subsequently codified at Neb. Rev. Stat. § 28-401 (1943), and later recodified at Neb. Rev. Stat. § 28-303 (Reissue 1995). In *Sundahl*, this court rejected a contention that the trial court erred in refusing to give a jury instruction that specified factors which the jury could or could not consider in exercising its discretion to impose a penalty of death pursuant to § 28-401. This court relied upon the interpretation of a similar federal statute by the U.S. Supreme Court in *Winston v. United States*, 172 U.S. 303, 313, 19 S. Ct. 212, 43 L. Ed. 456 (1899), in which the Court construed the jury’s right to impose the death penalty as follows: “The act does not itself prescribe, nor authorize the court to prescribe, any rule defining or circumscribing the exercise of this right; but commits the whole matter of its

exercise to the judgment and the consciences of the jury.” This court subsequently applied this same principle in holding that a trial court was not required to instruct the jury that it should impose a sentence of life imprisonment under § 28-401 if it had a reasonable doubt as to whether the death penalty was appropriate. *Grandsinger v. State*, 161 Neb. 419, 73 N.W.2d 632 (1955).

The principle of unrestricted discretion to impose the death penalty met its constitutional demise in *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972). In that case, which involved appeals from death sentences imposed under the laws of Georgia and Texas, the U.S. Supreme Court was asked to declare that the death penalty was unconstitutional because it constituted cruel and unusual punishment in violation of the Eighth Amendment. Two members of the Court held that the death penalty constituted cruel and unusual punishment under any circumstances. *Furman, supra* (Brennan, J., concurring; Marshall, J., concurring). Three other members of the Court, Justices Douglas, White, and Stewart, did not reach that issue, but concluded that the Georgia and Texas statutory procedures which gave a jury complete discretion to impose a death sentence violated the Eighth Amendment because they afforded “no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.” *Furman*, 408 U.S. at 313 (White, J., concurring). Justice Stewart further noted that the death penalty as administered in Georgia and Texas was cruel and unusual “in the same way being struck by lightning is cruel and unusual” in that it was “wantonly and . . . freakishly imposed.” *Furman*, 408 U.S. at 309-10. The remaining four justices dissented.

The Court subsequently characterized *Furman* as requiring that in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant. *Gregg v. Georgia*, 428 U.S. 153, 199, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976). In *Godfrey v. Georgia*, 446 U.S. 420, 428, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980), the Court further interpreted *Furman* and *Gregg* to mean that “if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor

and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty.” More specifically, the Court stated that capital sentencing statutes “must channel the sentencer’s discretion by ‘clear and objective standards’ that provide ‘specific and detailed guidance,’ and that ‘make rationally reviewable the process for imposing a sentence of death.’” *Id.* While articulating these general principles, the Court has been “unwilling to say that there is any one right way for a State to set up its capital sentencing scheme.” *Spaziano v. Florida*, 468 U.S. 447, 464, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984). See, *Pulley v. Harris*, 465 U.S. 37, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984); *Jurek v. Texas*, 428 U.S. 262, 96 S. Ct. 2950, 49 L. Ed. 2d 929 (1976); *Gregg*, *supra*.

In response to *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), the Nebraska Legislature enacted a new capital sentencing procedure, 1973 Neb. Laws, L.B. 268. See, Neb. Rev. Stat. §§ 29-2519 to 29-2546 (Reissue 1995 & Cum. Supp. 2002) (entitled “Special Procedure in Cases of Homicide”); *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977), *disapproved on other grounds*, *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986). In enacting this new procedure, the Legislature specifically found that “it is reasonable and necessary to establish mandatory standards for the imposition of the sentence of death”; that prior law “fail[ed] to allow for mitigating factors which may dictate against the penalty of death; and that the rational imposition of the death sentence requires the establishment of specific legislative guidelines to be applied in individual cases by the court.” 1973 Neb. Laws, L.B. 268. See § 29-2519.

Nebraska’s statutory capital sentencing procedures which were in effect at the time that Gales was convicted and sentenced were substantially similar to those enacted following *Furman*. Under these procedures, the determination of whether the defendant should be sentenced to death or life imprisonment was required to be made following a sentencing hearing by the judge who presided over the trial or accepted the guilty plea, or by a three-judge sentencing panel. § 29-2520. Section 29-2521 further provided:

In the proceeding for determination of sentence, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to

any of the aggravating or mitigating circumstances set forth in section 29-2523. Any such evidence which the court deems to have probative value may be received. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death. The court shall set forth the general order of procedure at the outset of the sentence determination proceeding.

Section 29-2523, which was in effect at the time of Gales' convictions and sentencing, provided:

The aggravating and mitigating circumstances referred to in sections 29-2521 and 29-2522 shall be as follows:

(1) Aggravating Circumstances:

(a) The offender was previously convicted of another murder or a crime involving the use or threat of violence to the person, or has a substantial prior history of serious assaultive or terrorizing criminal activity;

(b) The murder was committed in an effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of such crime;

(c) The murder was committed for hire, or for pecuniary gain, or the defendant hired another to commit the murder for the defendant;

(d) The murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence;

(e) At the time the murder was committed, the offender also committed another murder;

(f) The offender knowingly created a great risk of death to at least several persons;

(g) The victim was a public servant having lawful custody of the offender or another in the lawful performance of his or her official duties and the offender knew or should have known that the victim was a public servant performing his or her official duties;

(h) The murder was committed knowingly to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws; or

(i) The victim was a law enforcement officer engaged in the lawful performance of his or her official duties as a law

enforcement officer and the offender knew or reasonably should have known that the victim was a law enforcement officer.

The facts upon which the applicability of an aggravating circumstance depends must be proved beyond a reasonable doubt.

(2) Mitigating Circumstances:

(a) The offender has no significant history of prior criminal activity;

(b) The offender acted under unusual pressures or influences or under the domination of another person;

(c) The crime was committed while the offender was under the influence of extreme mental or emotional disturbance;

(d) The age of the defendant at the time of the crime;

(e) The offender was an accomplice in the crime committed by another person and his or her participation was relatively minor;

(f) The victim was a participant in the defendant's conduct or consented to the act; or

(g) At the time of the crime, the capacity of the defendant to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of law was impaired as a result of mental illness, mental defect, or intoxication.

Section 29-2522 provided:

After hearing all of the evidence and arguments in the sentencing proceeding, the judge or judges shall fix the sentence at either death or life imprisonment, but such determination shall be based upon the following considerations:

(1) Whether sufficient aggravating circumstances exist to justify imposition of a sentence of death;

(2) Whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances; or

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

In each case in which the court imposes the death sentence, the determination of the court shall be in writing and shall be supported by written findings of fact based upon the records of the trial and the sentencing proceeding, and referring to the aggravating and mitigating circumstances involved in its determination.

If an order is entered sentencing the defendant to death, a date for execution shall not be fixed until after the conclusion of the appeal provided for by section 29-2525.

The law further provided for automatic review of a death sentence by this court. § 29-2525.

[2] Nebraska's post-*Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), capital sentencing procedure was similar to that of many states in that it employed a process of determining and balancing aggravating and mitigating circumstances. The U.S. Supreme Court has characterized this process as consisting of an "eligibility decision," in which there must be a determination of the existence of one or more of the prescribed aggravating circumstances before a defendant convicted of a capital crime is eligible for a sentence of death, and a "selection decision," in which the sentencer determines whether a defendant eligible for the death penalty should in fact receive it, based upon an individualized determination of the character of the individual and the circumstances of the crime. *Tuilaepa v. California*, 512 U.S. 967, 971, 114 S. Ct. 2630, 129 L. Ed. 2d 750 (1994). See, also, *State v. Moore*, 250 Neb. 805, 553 N.W.2d 120 (1996), *disapproved on other grounds*, *State v. Reeves*, 258 Neb. 511, 604 N.W.2d 151 (2000). The Court has stated that in order for a capital sentencing scheme to comply with the Eighth Amendment to the U.S. Constitution, "it must perform a narrowing function with respect to the class of persons eligible for the death penalty and must also ensure that capital sentencing decisions rest upon an individualized inquiry." *Jones v. United States*, 527 U.S. 373, 381, 119 S. Ct. 2090, 144 L. Ed. 2d 370 (1999).

Nebraska's capital sentencing scheme, as it existed at the time of Gales' sentencing, differed from that of most other states in that it required a judge or panel of judges to decide whether a defendant convicted of a capital crime should be sentenced to

death or life imprisonment. See § 29-2520. After *Furman*, *supra*, most state legislatures chose to place this responsibility on a jury. See, Ark. Code Ann. § 5-4-602 (1997); Cal. Penal Code Ann. § 190.3 (West 1999); Conn. Gen. Stat. § 53a-46a (2001); Ga. Code Ann. § 17-10-31.1 (1997); 720 Ill. Comp. Stat. Ann. § 5/9-1(d) (Lexis Cum. Supp. 2002); Kan. Stat. Ann. § 21-4624(b) (1995); Ky. Rev. Stat. Ann. § 532.025(1)(b) (Michie Cum. Supp. 2002); La. Code Crim. Proc. Ann., art. 905.1 (West 1997); Md. Ann. Code Crim. Law § 2-303(c) (2002); Miss. Code Ann. § 99-19-101 (2000); Mo. Ann. Stat. §§ 565.030 and 565.032 (West Supp. 2003); Nev. Rev. Stat. § 175.552 (2001); N.H. Rev. Stat. Ann. § 630:5(II) (1996); N.J. Stat. Ann. § 2C:11-3c (West Supp. 2002); N.M. Stat. Ann. § 31-20A-1 (Michie 2000); N.Y. Crim. Proc. Law § 400.27 (McKinney Cum. Supp. 2003); N.C. Gen. Stat. § 15A-2000 (2002); Ohio Rev. Code Ann. § 2929.03 (West 2002); Okla. Stat. Ann. tit. 21, § 701.10(A) (West 2002); Ore. Rev. Stat. § 163.150 (2001); 42 Pa. Stat. Ann. § 9711 (West Cum. Supp. 2002); S.C. Code Ann. § 16-3-20(B) (West Cum. Supp. 2000); S.D. Codified Laws § 23A-27A-2 (Michie 1998); Tenn. Code Ann. § 39-13-204 (Supp. 2002); Tex. Crim. Proc. Code Ann. § 37.071 (Vernon Cum. Supp. 2003); Utah Code Ann. § 76-3-207 (Supp. 2002); Va. Code Ann. § 19.2-264.3 (2000); Wash. Rev. Code § 10.95.050 (2002); Wyo. Stat. Ann. § 6-2-102 (2001). Of the 38 states which authorized capital punishment at the time that *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), was decided, 29 states committed sentencing decisions to juries; 5 states, including Arizona and Nebraska, entrusted both capital sentencing factfinding and sentencing determination to judges; and 4 states utilized hybrid systems, whereby juries rendered advisory verdicts but a judge made the final sentencing determination. *Ring*, *supra*.

After *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), and prior to *Ring*, *supra*, the U.S. Supreme Court decided several cases addressing the issue of whether jury sentencing is constitutionally required in capital cases. *Proffitt v. Florida*, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976), was the first in a series of U.S. Supreme Court cases involving Florida's capital sentencing statutes which permitted a jury to

return an advisory verdict on sentencing, but reserved to the trial judge the ultimate authority to determine the sentence after independently weighing the aggravating and mitigating circumstances. The Court observed that the principal difference between Florida's post-*Furman* capital sentencing statutes and those of Georgia which were upheld in *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976), was the fact that in Florida, the sentence was determined by the judge rather than by the jury. Noting its observation in *Witherspoon v. Illinois*, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968), that jury sentencing in a capital case can perform an important societal function, the plurality in *Proffitt* reasoned

but it has never [been] suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition [of sentence] at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases.

428 U.S. at 252. The plurality concluded that because Florida gave trial judges "specific and detailed guidance to assist them in deciding whether to impose a death penalty or imprisonment for life," the Florida statutes, like those of Georgia upheld in *Gregg*, "pass[ed] constitutional muster." *Proffitt*, 428 U.S. at 253, 259.

This court relied upon *Proffitt* in rejecting a challenge to Nebraska's post-*Furman* capital sentencing scheme in *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977), *disapproved on other grounds*, *State v. Reeves*, 234 Neb. 711, 453 N.W.2d 359 (1990). The defendant argued that our capital sentencing scheme was unconstitutional because it did not provide for the involvement of a jury in sentencing. Based upon *Proffitt*, we unanimously concluded:

As we understand the federal and the state constitutional provisions, they do not require or even suggest that jury sentencing is constitutionally required. Whatever the relative merits of sentencing by a judge or jury may be, we need not consider them. Our concern is the constitutionality of the Nebraska system, under the federal and state Constitutions.

The relative merits of the one or the other is for legislative and not judicial determination.

Simants, 197 Neb. at 559, 250 N.W.2d at 888.

The U.S. Supreme Court revisited the Florida capital sentencing scheme in *Spaziano v. Florida*, 468 U.S. 447, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984), a first degree murder case in which the trial judge set aside the jury's advisory life sentence and imposed the death penalty based in part upon evidence of a prior conviction which had not been submitted to the jury. Rejecting the petitioner's "fundamental premise . . . that the capital sentencing decision is one that, in all cases, should be made by a jury," the Court held:

This Court's decisions indicate that the discretion of the sentencing authority, whether judge or jury, must be limited and reviewable. . . . The sentencer is responsible for weighing the specific aggravating and mitigating circumstances the legislature has determined are necessary touchstones in determining whether death is the appropriate penalty. Thus, even if it is a jury that imposes the sentence, the "community's voice" is not given free rein. The community's voice is heard at least as clearly in the legislature when the death penalty is authorized and the particular circumstances in which death is appropriate are defined. . . .

We do not denigrate the significance of the jury's role as a link between the community and the penal system and as a bulwark between the accused and the State. . . . *The point is simply that the purpose of the death penalty is not frustrated by, or inconsistent with, a scheme in which the imposition of the penalty in individual cases is determined by a judge.*

(Citations omitted.) (Emphasis supplied.) *Spaziano*, 468 U.S. at 458, 462-63. The Court acknowledged that the majority of state capital sentencing statutes authorized juries to impose the sentence, but held that this fact did not invalidate Florida's scheme by which the trial judge had final sentencing authority. The Court reasoned that "[t]he Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws." 468 U.S. at 464. It concluded:

In light of the facts that the Sixth Amendment does not require jury sentencing, that the demands of fairness and reliability in capital cases do not require it, and that neither the nature of, nor the purpose behind, the death penalty requires jury sentencing, we cannot conclude that placing responsibility on the trial judge to impose the sentence in a capital case is unconstitutional.

As the Court several times has made clear, we are unwilling to say that there is any one right way for a State to set up its capital sentencing scheme.

468 U.S. at 464.

In *Hildwin v. Florida*, 490 U.S. 638, 640, 109 S. Ct. 2055, 104 L. Ed. 2d 728 (1989), the Court characterized the statutory aggravating circumstances which must be found before a death sentence may be imposed as “‘sentencing factor[s]’” which come into play only after a determination of guilt, and not as elements of the offense. The Court concluded that “the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.” 490 U.S. at 640-41. This court specifically relied on *Hildwin* in rejecting a claim that § 29-2522 was unconstitutional on the ground that it denied a criminal defendant the right to have a jury determine the factual issues comprising first degree murder. *State v. Ryan*, 233 Neb. 74, 444 N.W.2d 610 (1989).

In *Enmund v. Florida*, 458 U.S. 782, 797, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982), the Court held that the principles of proportionality embodied in the Eighth Amendment preclude the imposition of the death penalty on “one . . . who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed.” In *Cabana v. Bullock*, 474 U.S. 376, 106 S. Ct. 689, 88 L. Ed. 2d 704 (1986), *abrogated on other grounds*, *Pope v. Illinois*, 481 U.S. 497, 107 S. Ct. 1918, 95 L. Ed. 2d 439 (1987), the Court was presented with the issue of whether the existence of facts necessary to impose the death penalty under the rule in *Enmund* must be determined by a jury. The Court began its analysis by noting that neither the Mississippi jury’s verdict of guilt nor its sentence of death “necessarily reflect[ed] a finding that Bullock

killed, attempted to kill, or intended to kill.” *Cabana*, 474 U.S. at 383. Although the Court determined that the Mississippi court would be required to make the *Enmund* determination in order for the death sentence to stand, it concluded that “[t]he proceeding that the state courts must provide Bullock need not take the form of a new sentencing hearing before a jury.” *Cabana*, 474 U.S. at 392. The Court observed that it had never required a jury to make the determination of whether a particular sentence was appropriate in any given case and noted that in *Spaziano v. Florida*, 468 U.S. 447, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984), it “specifically rejected the argument that the Sixth Amendment or any other constitutional provision provides a defendant with the right to have a jury consider the appropriateness of a capital sentence.” *Cabana*, 474 U.S. at 385-86. The Court concluded that the categorical rule of *Enmund* is a “substantive limitation on sentencing, and like other such limits it need not be enforced by the jury.” *Cabana*, 474 U.S. at 386. The Court reiterated its prior statements to the effect that a state “has considerable freedom to structure its capital sentencing system as it sees fit” and that there is no “‘one right way’” to accomplish this task. 474 U.S. at 386-87, quoting *Spaziano*, *supra*.

The U.S. Supreme Court first considered a challenge to Arizona’s capital sentencing scheme in *Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990). The Arizona statutes at issue provided that when a defendant was convicted by a judge or jury of first degree murder, the sentence would be determined after the judge, sitting without a jury, determined the existence of aggravating and mitigating circumstances, and whether there were sufficient mitigating circumstances to warrant a sentence of life imprisonment instead of death. Walton argued on appeal that

every finding of fact underlying the sentencing decision must be made by a jury, not by a judge, and that the Arizona scheme would be constitutional only if a jury decides what aggravating and mitigating circumstances are present in a given case and the trial judge then imposes sentence based on those findings.

497 U.S. at 647. In rejecting this argument, the Court noted that it had “repeatedly . . . rejected constitutional challenges to Florida’s

death sentencing scheme, which provides for sentencing by the judge, not the jury.” *Id.*, citing *Hildwin v. Florida*, 490 U.S. 638, 109 S. Ct. 2055, 104 L. Ed. 2d 728 (1989), *Spaziano, supra*, and *Proffitt v. Florida*, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976). The Court also rejected Walton’s claim that aggravating circumstances under the Arizona statute were “‘elements of the offense,’” noting that the finding of any particular aggravating circumstance does not in itself convict a defendant or require the death penalty, and the failure to find any particular aggravating circumstance does not “‘“acquit”” or preclude the death penalty. *Walton*, 497 U.S. at 648. The Court further relied on its holding in *Cabana v. Bullock*, 474 U.S. 376, 106 S. Ct. 689, 88 L. Ed. 2d 704 (1986), *abrogated on other grounds, Pope v. Illinois*, 481 U.S. 497, 107 S. Ct. 1918, 95 L. Ed. 2d 439 (1987), that the findings required by *Enmund v. Florida*, 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982), need not be made by a jury. In rejecting another of Walton’s claims, the Court held that a “defendant’s constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency.” *Walton*, 497 U.S. at 650.

(b) Sixth Amendment Right to Jury Determination
of Facts Affecting Punishment

[3] Due process of law requires the prosecution to prove beyond a reasonable doubt every fact necessary to constitute the crime charged. *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Applying this principle, the U.S. Supreme Court held that a Maine law which required a defendant charged with murder to prove that he acted “‘in the heat of passion on sudden provocation’” in order to reduce the charge to manslaughter constituted a denial of due process. *Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975). The Court reasoned that because the absence of “heat of passion” was a critical fact distinguishing the offense of murder from the offense of manslaughter, which carried a lesser penalty, due process “requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case.” 421 U.S. at 702, 704.

However, in *Patterson v. New York*, 432 U.S. 197, 198, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977), the Court upheld the constitutionality of a statute which created an affirmative defense whereby a defendant charged with second degree murder could obtain a reduction of the charge to manslaughter by showing that he acted under “‘extreme emotional disturbance.’” The Court reasoned that *Mullaney* could not be read so broadly as to prohibit the State from permitting “the blameworthiness of an act or the severity of punishment authorized for its commission to depend on the presence or absence of an identified fact without assuming the burden of proving the presence or absence of that fact . . . beyond a reasonable doubt.” *Patterson*, 432 U.S. at 214. The majority in *Patterson* reasoned that the State’s recognition of extreme emotional disturbance as a “mitigating circumstance” which differentiates murder from manslaughter “does not require the State to prove its nonexistence in each case in which the fact is put in issue, if in its judgment this would be too cumbersome, too expensive, and too inaccurate.” 432 U.S. at 209. The dissent in *Patterson* rejected the majority’s distinction of *Mullaney*, noting that the majority’s explanation of the *Mullaney* holding “bears little resemblance to the basic rationale of that decision.” *Patterson*, 432 U.S. at 222-23 (Powell, J., dissenting; Brennan and Marshall, JJ., join).

The majority opinion in *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S. Ct. 2411, 91 L. Ed. 2d 67 (1986), addressed the tension in *Mullaney* and *Patterson* by focusing upon the distinction between elements of an offense and sentencing considerations which affect punishment, noting that only facts which constitute elements must be proved by the prosecution beyond a reasonable doubt. The Pennsylvania statute under consideration in *McMillan* provided that anyone convicted of certain enumerated felonies was subject to a mandatory minimum sentence of 5 years’ imprisonment if the judge determined, at a sentencing hearing, that the defendant “‘visibly possessed a firearm’” during the commission of the offense. 477 U.S. at 81. The majority reasoned that by enacting this mandatory minimum sentencing scheme, the Pennsylvania Legislature did not change the elements of existing offenses, but, rather, dictated the weight which

should be given to “one factor that has always been considered by sentencing courts to bear on punishment—the instrumentality used in committing a violent felony.” 477 U.S. at 89. Citing *Spaziano v. Florida*, 468 U.S. 447, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984), the Court also rejected a claim that the mandatory minimum sentencing scheme impinged upon the petitioners’ right to trial by jury, noting that “there is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact.” *McMillan*, 477 U.S. at 93.

In *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998), the Court relied upon its reasoning in *Spaziano*, *supra*, and *Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990). In *Almendarez-Torres*, the Court considered a federal criminal statute forbidding a deported alien to return to the United States without special permission. One section of the statute authorized a prison term of up to 2 years, but another section authorized a sentence of imprisonment of up to 20 years if the initial “‘deportation was subsequent to a conviction for commission of an aggravated felony.’” 523 U.S. at 229, quoting 8 U.S.C. § 1326(b)(2) (1994). The Court held that the provision of the statute authorizing the greater penalty constituted a “sentencing factor.” 523 U.S. at 235. In rejecting a contention that the Court should treat the prior conviction as a separate element of the offense, the Court noted that “such a rule would seem anomalous in light of existing case law that permits a judge, rather than a jury, to determine the existence of factors that can make a defendant eligible for the death penalty.” 523 U.S. at 247, citing *Walton*, *supra*, *Hildwin v. Florida*, 490 U.S. 638, 109 S. Ct. 2055, 104 L. Ed. 2d 728 (1989), and *Spaziano*, *supra*.

However, a year later, in *Jones v. United States*, 526 U.S. 227, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999), the Court considered a federal carjacking statute which provided for an enhanced penalty if serious bodily injury resulted from the carjacking, and a further enhancement in the event of a resulting death. See 18 U.S.C. § 2119 (2000). The majority concluded that the statute defined three separate offenses, each of which must be charged by indictment and proved to a jury beyond a reasonable doubt. Writing in dissent, Justice Kennedy noted that the reasoning of

the majority was inconsistent with *Walton* and predicted that “[r]eexamination of this area of our capital jurisprudence can be expected.” *Jones*, 526 U.S. at 272.

[4] The next decision in this line of authority was *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). In *Apprendi*, the defendant entered a guilty plea to two counts of possession of a firearm for an unlawful purpose, an offense carrying a penalty range of 5 to 10 years’ imprisonment. After the pleas were accepted, the trial judge conducted an evidentiary hearing pursuant to the New Jersey “‘hate crime’” enhancement statute which permitted an enhanced penalty if the crime was committed “‘with a purpose to intimidate . . . because of race.’” *Apprendi*, 530 U.S. at 468-69. Based on a preponderance of the evidence, the trial judge found the requisite intent because the crime was “‘motivated by racial bias’” and imposed an enhanced sentence. 530 U.S. at 471. The New Jersey Supreme Court affirmed. *State v. Apprendi*, 159 N.J. 7, 731 A.2d 485 (1999). The U.S. Supreme Court granted certiorari and reversed, with the majority holding that under the Due Process Clause of the 14th Amendment, “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.” *Apprendi*, 530 U.S. at 490. Noting the “constitutionally novel and elusive distinction between ‘elements’ and ‘sentencing factors’” drawn in *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S. Ct. 2411, 91 L. Ed. 2d 67 (1986), the Court stated: “Despite what appears to us the clear ‘elemental’ nature of the [intent] factor here, the relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury’s guilty verdict?” *Apprendi*, 530 U.S. at 494. The majority concluded that the New Jersey hate crime enhancement statute had that effect and therefore triggered a constitutional requirement that pertinent facts be determined by a jury beyond a reasonable doubt. Relying in part upon a dissenting opinion of one of its members in *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998), the *Apprendi* majority concluded that its holding was not inconsistent with *Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047,

111 L. Ed. 2d 511 (1990). Writing in dissent, Justice O'Connor disagreed, stating:

If a State can remove from the jury a factual determination that makes the difference between life and death, as *Walton* holds that it can, it is inconceivable why a State cannot do the same with respect to a factual determination that results in only a 10-year increase in the maximum sentence to which a defendant is exposed.

Apprendi, 530 U.S. at 537.

2. *RING V. ARIZONA*

Timothy Stuart Ring participated in an armored van robbery in Glendale, Arizona, in which the driver of the van was killed. At his trial, the jury was instructed on alternative charges of premeditated murder and felony murder. The jury reached a deadlock on the premeditated murder charge, but convicted Ring of felony murder. A separate sentencing hearing was then conducted by the trial judge, sitting without a jury, as required under Arizona's capital sentencing statutes then in effect. See Ariz. Rev. Stat. Ann. § 13-703(C) (West Supp. 2001). Arizona law provided that the penalty for first degree murder was death or life imprisonment, but specified that the death penalty could be imposed only if the trial judge found at least 1 of 10 statutory "aggravating circumstance[s]" and "no mitigating circumstances sufficiently substantial to call for leniency." *Ring v. Arizona*, 536 U.S. 584, 593, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002); § 13-703(F) and (G).

Based upon testimony at the sentencing hearing by one of Ring's accomplices, the trial judge found that Ring was a major participant in the robbery and that he fired the fatal shot. The judge found that two statutory aggravating circumstances existed and that one nonstatutory mitigator existed but did not warrant leniency. Based upon these findings, Ring was sentenced to death.

On direct appeal to the Arizona Supreme Court, Ring argued on the basis of *Jones v. United States*, 526 U.S. 227, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999), and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), that the Arizona capital sentencing scheme violated the 6th and 14th Amendments to the U.S. Constitution. *State v. Ring*, 200 Ariz. 267, 25 P.3d 1139 (2001). While noting that the U.S. Supreme

Court did not overrule *Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990), in its subsequent decisions in *Jones* and *Apprendi*, the Arizona Supreme Court acknowledged that those cases cast doubt upon the continued viability of *Walton*. After quoting Justice O'Connor's dissenting opinion which took issue with the manner in which the *Apprendi* majority characterized Arizona's capital sentencing scheme in distinguishing *Walton*, the Arizona Supreme Court agreed with Justice O'Connor's characterization, stating:

In Arizona, a defendant cannot be put to death solely on the basis of a jury's verdict, regardless of the jury's factual findings. The range of punishment allowed by law on the basis of the verdict alone is life imprisonment with the possibility of parole or imprisonment for "natural life" without the possibility of release. . . . It is only after a subsequent adversarial sentencing hearing, at which the judge alone acts as the finder of the necessary statutory factual elements, that a defendant may be sentenced to death. . . . And even then a death sentence may not legally be imposed by the trial judge unless at least one aggravating factor is found to exist beyond a reasonable doubt. . . . Thus, when the state seeks the death penalty, a separate evidentiary hearing, without a jury, must be held; the death sentence becomes possible only after the trial judge makes a factual finding that at least one aggravating factor is present. The judge makes that finding on the basis of the evidence presented at trial and any other evidence presented at the aggravation/mitigation hearing. . . . If the judge finds an aggravating circumstance, he must then proceed to determine if there are any mitigating circumstances. . . . If the judge finds mitigating circumstances, he must then weigh them against the aggravators and decide by "special verdict" whether a death sentence is appropriate.

(Citations omitted.) *State v. Ring*, 200 Ariz. at 279, 25 P.3d at 1151. Rejecting Ring's argument that *Walton* could not stand after *Apprendi*, the Arizona Supreme Court determined that it was bound by the Supremacy Clause to follow the "controlling authority" of *Walton*. *State v. Ring*, 200 Ariz. at 280, 25 P.3d at 1152. Although it determined that there was insufficient evidence to

support one of the aggravating circumstances found by the trial judge, the court concluded that the mitigating circumstance balanced against the remaining aggravating circumstance did not warrant leniency, and therefore affirmed the death sentence. *Id.*

The U.S. Supreme Court granted Ring's petition for certiorari and reversed the judgment. The Court began its analysis with the premise, derived from the Arizona Supreme Court's construction of that state's capital sentencing laws, that "[b]ased solely on the jury's verdict finding Ring guilty of first-degree felony murder, the maximum punishment he could have received was life imprisonment." *Ring v. Arizona*, 536 U.S. 584, 597, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002). Rejecting the Arizona Supreme Court's reliance on the distinction drawn in *Walton* between elements of an offense and sentencing factors, the Court noted that "*Apprendi* repeatedly instructs in that context that the characterization of a fact or circumstance as an 'element' or a 'sentencing factor' is not determinative of the question 'who decides,' judge or jury." *Ring*, 536 U.S. at 604-05. The Court concluded

that *Walton* and *Apprendi* are irreconcilable; our Sixth Amendment jurisprudence cannot be home to both. Accordingly, we overrule *Walton* to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty. . . . Because Arizona's enumerated aggravating factors operate as "the functional equivalent of an element of a greater offense," *Apprendi*, 530 U.S., at 494, n. 19, the Sixth Amendment requires that they be found by a jury.

(Citation omitted.) *Ring*, 536 U.S. at 609. Accordingly, the U.S. Supreme Court reversed the judgment of the Arizona Supreme Court and remanded the cause for further proceedings not inconsistent with its opinion.

3. APPLICATION OF *RING V. ARIZONA* TO THIS CASE

[5-7] *Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990), was the controlling Sixth Amendment precedent when Gales was sentenced to death on November 6, 2001. Under *Walton*, it was constitutionally permissible to impose a

death sentence on the basis of aggravating circumstances determined by a judge sitting without a jury. However, during the pendency of an appeal in a criminal case, "the execution of the sentence or judgment shall be suspended until such time as the appeal has been determined." Neb. Rev. Stat. § 29-2301 (Reissue 1995); *Jones v. Clarke*, 253 Neb. 161, 568 N.W.2d 897 (1997). A sentence is not a final judgment until the entry of a final mandate of an appellate court. *Jones, supra*; *State v. Warner*, 192 Neb. 438, 222 N.W.2d 292 (1974). *Ring* was decided during the pendency of this automatic direct appeal, at a time when Gales' sentences had not yet become final. The Supreme Court has held that new constitutional rules apply to all state or federal cases which are pending on direct review or are not yet final when the rule is announced. *Griffith v. Kentucky*, 479 U.S. 314, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987). Because *Ring* is now the law of the land and Gales preserved the Sixth Amendment issue it addresses prior to his sentencing, we are required to review his death sentences in accordance with the constitutional principle announced in *Ring*.

The statutory capital sentencing procedures under which Gales was sentenced required the judge to base the sentence imposed on three considerations:

(1) Whether sufficient aggravating circumstances exist to justify imposition of a sentence of death;

(2) Whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances; or

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

§ 29-2522. Gales argues that under *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), all three considerations must be submitted to a jury. We conclude that the holding in *Ring* is not that broad. In characterizing Ring's claim as "tightly delineated," the U.S. Supreme Court stated:

[Ring] contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him. No aggravating circumstance related to past convictions in his case; Ring therefore does not challenge

Almendarez-Torres v. United States, 523 U.S. 224 (1998), which held that the fact of prior conviction may be found by the judge even if it increases the statutory maximum sentence. He makes no Sixth Amendment claim with respect to mitigating circumstances. See *Apprendi v. New Jersey*, 530 U.S. 466, 490-491, n. 16 (2000) (noting “the distinction the Court has often recognized between facts in aggravation of punishment and facts in mitigation” (citation omitted)). Nor does he argue that the Sixth Amendment required the jury to make the ultimate determination whether to impose the death penalty. See *Proffitt v. Florida*, 428 U.S. 242, 252 (1976) (plurality opinion) (“[I]t has never [been] suggested that jury sentencing is constitutionally required.”). He does not question the Arizona Supreme Court’s authority to reweigh the aggravating and mitigating circumstances after that court struck one aggravator. See *Clemons v. Mississippi*, 494 U.S. 738, 745 (1990). Finally, Ring does not contend that his indictment was constitutionally defective. See *Apprendi*, 530 U.S., at 477, n. 3 (Fourteenth Amendment “has not . . . been construed to include the Fifth Amendment right to ‘presentment or indictment of a Grand Jury’”).

Ring, 536 U.S. at 597-98 n.4.

While one member of the Court concurred in *Ring* based upon his opinion that “jury sentencing in capital cases is mandated by the Eighth Amendment,” no other Justice joined in this concurrence. *Ring*, 536 U.S. at 614 (Breyer, J., concurring in judgment). Accordingly, we interpret *Ring* as affecting only the narrow issue of whether there is a Sixth Amendment right to have a jury determine the existence of any aggravating circumstance upon which a capital sentence is based.

In holding that such a right existed under Arizona’s capital sentencing scheme, the U.S. Supreme Court emphasized that while the statute authorized a maximum sentence of death for the offense of first degree murder, it required the finding of an aggravating circumstance before a death sentence could be imposed. Applying the principle of *Apprendi v. New Jersey*, 530

U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), that it is the function, not the characterization, of a fact or circumstance which determines “‘who decides,’ judge or jury,” the Court held that because aggravating circumstances under the Arizona statute “operate as ‘the functional equivalent of an element of a greater offense,’ *Apprendi*, 530 U.S., at 494, n. 19, the Sixth Amendment requires that they be found by a jury.” *Ring*, 536 U.S. at 605, 609.

At the time of Gales’ trial and sentencing, Nebraska statutes classified murder in the first degree as a Class IA felony punishable by life imprisonment or a Class I felony punishable by death, depending upon the factual determinations made under §§ 29-2520 to 29-2524. See Neb. Rev. Stat. §§ 28-105(1) (Cum. Supp. 2002) and 28-303. Under these statutes, a death sentence could not be imposed absent the existence of at least one of the aggravating circumstances set forth in § 29-2523. *State v. Hunt*, 220 Neb. 707, 371 N.W.2d 708 (1985), *disapproved on other grounds*, *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986). Stated another way, a person convicted of first degree murder in Nebraska was not “eligible” for the death penalty unless the State proved one or more of the statutory aggravating circumstances beyond a reasonable doubt. See, *Tuilaepa v. California*, 512 U.S. 967, 114 S. Ct. 2630, 129 L. Ed. 2d 750 (1994); *State v. Moore*, 250 Neb. 805, 553 N.W.2d 120 (1996), *disapproved on other grounds*, *State v. Reeves*, 258 Neb. 511, 604 N.W.2d 151 (2000). In this sense, our capital sentencing scheme was similar to that of Arizona, and *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), therefore requires that in order to fulfill the guarantee of rights conferred by the Sixth Amendment, the existence of any aggravating circumstance utilized in the imposition of Gales’ sentence of death, other than a prior criminal conviction, must be determined by a jury.

It is clear that the jury made no explicit determination that any of the statutory aggravating circumstances existed in this case. Instead, that determination was made by a judge. This procedure violated the constitutional principle articulated in *Ring*, and Gales’ death sentences imposed on each count of first degree murder must therefore be vacated.

4. RESENTENCING

This court lacks statutory authority to resentence a criminal defendant to death in a homicide case when we have found a reversible error in the sentencing proceedings. *Reeves, supra*. The parties agree that this cause must be remanded to the district court for resentencing based upon *Ring* error. They disagree, however, as to the law applicable to resentencing and the permissible scope thereof. On July 5, 2002, Gales filed in this court a motion to vacate his death sentence and a request for the imposition of a sentence of life imprisonment. In this filing, Gales stated:

The U.S. Supreme Court has recently determined that no one can be given a death sentence unless the sentence is imposed by a jury. *Ring v. Arizona* No. 01-488 slip op. (U.S.S. Court June 24, 2002). Since the appellant was sentenced by a single judge to a death sentence, and since his appeal was pending before this court at the time that *Ring*, *supra*, was decided, this [c]ourt should vacate the death sentence and impose a sentence of life imprisonment because the death sentence was incorrectly imposed.

The State filed a response in which it asserted that “[a]lthough *Ring* does not require jury sentencing, *Ring* does require jury fact finding in the penalty phase of a Nebraska first degree murder trial.” The State concluded:

The appropriate relief would be an order of remand to the district court to conduct a new penalty phase hearing in the following manner: (a) the summoning and selection of a jury, by the same means any criminal jury is summoned and selected when required by the 6th Amendment, to hear the State’s evidence of aggravating circumstances; (b) specific findings of the jury as to which, if any, of the statutory aggravating circumstances upon which evidence was offered by the State have been proven to exist beyond a reasonable doubt; (c) the dismissal of the jury once that fact finding is completed; and (d) the determination of an appropriate sentence by the trial court under §§ 29-2520 and 29-2522 based upon the factual findings of the jury and the record of that proceeding.

It was in this procedural posture that the case was originally briefed and argued to this court on November 5, 2002.

On November 26, 2002, while this matter was under submission, the State filed a "Notice of Legislation" advising this court that during a special session, the Nebraska Legislature enacted 2002 Neb. Laws, L.B. 1, of the 97th Legislature, Third Special Session, with the emergency clause "to satisfy the new 6th Amendment requirements articulated in *Ring*." The State requested that this cause be remanded for resentencing pursuant to L.B. 1. Gales filed a written objection to this request in which he renewed his request that he be resentenced to life imprisonment. We ordered supplemental briefs on the issues raised by the State's request that we remand for resentencing pursuant to L.B. 1.

(a) L.B. 1: Content

L.B. 1 was enacted with the emergency clause and signed by the Governor on November 22, 2002. The new legislation amends various statutes dealing with the offense of murder in the first degree, including the capital sentencing statutes codified in chapter 29, article 25, of the Nebraska Revised Statutes. Section 29-2519, which sets forth the Legislature's statement of intent with respect to the capital sentencing statutes, is amended by § 10 of L.B. 1 to include the following additional language:

(2) The Legislature hereby finds and declares that:

(a) The decision of the United States Supreme Court in *Ring v. Arizona* (2002) requires that Nebraska revise its sentencing process in order to ensure that rights of persons accused of murder in the first degree, as required under the Sixth and Fourteenth Amendments of the United States Constitution, are protected;

(b) The changes made by this legislative bill are intended to be procedural only in nature and ameliorative of the state's prior procedures for determination of aggravating circumstances in the sentencing process for murder in the first degree;

(c) The changes made by this legislative bill are not intended to alter the substantive provisions of sections 28-303 and 29-2520 to 29-2524;

(d) The aggravating circumstances defined in section 29-2523 have been determined by the United States Supreme Court to be "functional equivalents of elements

of a greater offense” for purposes of the defendant’s Sixth Amendment right, as applied to the states under the Fourteenth Amendment, to a jury determination of such aggravating circumstances, but the aggravating circumstances are not intended to constitute elements of the crime generally unless subsequently so required by the state or federal constitution; and

(e) To the extent that such can be applied in accordance with state and federal constitutional requirements, it is the intent of the Legislature that the changes to the murder in the first degree sentencing process made by this legislative bill shall apply to any murder in the first degree sentencing proceeding commencing on or after the effective date of this act.

Generally, L.B. 1 makes two significant changes in Nebraska’s capital sentencing procedure. First, it provides for an “aggravation hearing” following a determination of guilt in a first degree murder case, at which a jury determines whether aggravating circumstances alleged by the State exist, unless such determination by a jury is waived by the defendant. L.B. 1, § 11. Second, it removes the option of sentencing by the trial judge and requires sentencing by a panel of three judges. *Id.*, § 12. L.B. 1 does not change the statutory definitions of aggravating and mitigating circumstances or the manner in which they are to be balanced. *Id.*, §§ 14 and 15. However, L.B. 1 does amend the specified minimum penalty for a Class IA felony from “[l]ife imprisonment” to “[l]ife imprisonment without parole.” *Id.*, § 1. Finally, L.B. 1 includes a severability provision stating that “[i]f any section in this act or any part of any section is declared invalid or unconstitutional, the declaration shall not affect the validity or constitutionality of the remaining portions.” *Id.*, § 18.

(b) L.B. 1: Application

As noted, in enacting L.B. 1, the Legislature expressly stated that it intended the changes to apply to all first degree murder sentencing proceedings commencing on or after November 23, 2002, the effective date of the amendment. L.B. 1, § 10. In his supplemental briefs, Gales makes several arguments why the provisions of L.B. 1 should not be applied in this case on

remand. We interpret these as facial challenges to the constitutionality of L.B. 1.

(i) *Sixth Amendment/Apprendi Challenge*

We initially address Gales' argument that L.B. 1 fails to meet the Sixth Amendment requirements defined in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), because L.B. 1 does not authorize a jury to weigh aggravating circumstances against mitigating circumstances or conduct a proportionality review prior to the determination of the sentence. Gales acknowledges that *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), does not address these issues because they were not presented in that case. However, he argues that because *Ring* relied upon *Apprendi* in holding that an accused in a capital case has a right to a jury determination of whether aggravating circumstances exist, we should determine, based upon *Apprendi*, that a jury must also conduct the weighing and proportionality review functions of capital sentencing. Based upon a similar rationale, Gales contends that a sentencing judge may not consider facts set forth in a presentence investigation.

[8] We reject both arguments. As noted above, we understand *Ring* as recognizing a Sixth Amendment right to a jury determination of the existence of aggravating circumstances which determine "death eligibility," because in the absence of at least one such circumstance, the death penalty cannot be imposed. It is the determination of "death eligibility" which exposes the defendant to greater punishment, and such exposure triggers the Sixth Amendment right to jury determination as delineated in *Apprendi* and *Ring*. In contrast, the determination of mitigating circumstances, the balancing of aggravating circumstances against mitigating circumstances, and proportionality review are part of the "selection decision" in capital sentencing, which, under the current and prior statutes, occurs only after eligibility has been determined. See § 29-2522; L.B. 1, § 14. These determinations cannot increase the potential punishment to which a defendant is exposed as a consequence of the eligibility determination. Accordingly, we do not read either *Apprendi* or *Ring* to require that the determination of mitigating circumstances,

the balancing function, or proportionality review be undertaken by a jury.

Moreover, we note that the constitutionality of judicial sentencing was specifically upheld in that portion of *Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990), which was not overruled by *Ring*. *Walton* thus remains binding constitutional precedent on this issue, which we are obligated to follow even if we were to read *Ring* as casting doubt on its future viability. The U.S. Supreme Court has clearly stated that “[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.” *Rodriguez de Quijas v. Shearson/Am. Exp.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989). Subsequent to the decision in *Ring*, the Florida Supreme Court relied in part upon this principle in denying habeas corpus relief to a person sentenced to death under the Florida capital sentencing statutes which the U.S. Supreme Court found constitutional in *Hildwin v. Florida*, 490 U.S. 638, 109 S. Ct. 2055, 104 L. Ed. 2d 728 (1989), *Spaziano v. Florida*, 468 U.S. 447, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984), and *Proffitt v. Florida*, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976), noting that these decisions were not overruled in *Ring*. *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002).

Gales’ argument that provisions of L.B. 1 which require a sentencing panel to make use of a presentence investigation report are unconstitutional under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), is similarly without merit. Section 9 of L.B. 1 amends Neb. Rev. Stat. § 29-2261 (Cum. Supp. 2000) to include the following language:

When an offender has been convicted of murder in the first degree and (a) a jury renders a verdict finding the existence of one or more aggravating circumstances as provided in section 29-2520 or (b)(i) the information contains a notice of aggravation as provided in section 29-1603 and (ii) the offender waives his or her right to a jury determination of the alleged aggravating circumstances, the court shall not commence the sentencing determination proceeding as

provided in section 29-2521 without first ordering a presentence investigation of the offender and according due consideration to a written report of such investigation.

In capital cases where a jury is not waived, this provision requires the sentencing panel to utilize a presentence investigation only in the selection phase of the capital sentencing, which occurs *after* the defendant has been determined by a jury to be eligible to receive the death penalty. Because the defendant is already exposed to the maximum punishment permitted by law at the time the sentencing panel is required by this statute to consider the presentence investigation report, the statutory provision is not facially unconstitutional under *Apprendi*, *supra*, or *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

(ii) *Substantive or Procedural Change*

[9] Gales argues that L.B. 1 “confers a substantive right that previously never existed in Nebraska’s death penalty statutes,” specifically, “the right to a jury determination of aggravating factors.” Supplemental brief for appellant at 5. He argues that this “substantive change in the law . . . is prospective only.” *Id.* Statutes covering substantive matters in effect at the time of a transaction govern, not later-enacted statutes. *State v. Groff*, 247 Neb. 586, 529 N.W.2d 50 (1995). However, the procedures and procedural rules to be applied are those which are in effect at the date of the hearing or proceeding, and not those in effect when the act or violation allegedly took place. *State v. Wilcox*, 230 Neb. 123, 430 N.W.2d 58 (1988); *State v. Shiffbauer*, 197 Neb. 805, 251 N.W.2d 359 (1977).

It is of course true that at the time of the commission of the murders for which Gales was found guilty, Nebraska capital sentencing law required the trial judge or a three-judge sentencing panel to determine whether one or more of the aggravating circumstances existed in order to determine whether a defendant found guilty of first degree murder was eligible to receive the death penalty. §§ 29-2520 through 29-2522. With the enactment of L.B. 1 in response to *Ring*, the law has been changed to provide that the existence of aggravating circumstances is to be determined by a jury unless waived by the defendant. L.B. 1, § 11. To determine whether the law as amended can be applied to Gales’

resentencing, we must determine under the foregoing principles whether the change in the law effected by L.B. 1 was substantive or procedural in nature.

We conclude that the change was procedural. The amendment in question does not alter the substantive nature of the statutory aggravating circumstances, one or more of which must be proved by the State beyond a reasonable doubt before the death penalty may be considered for a defendant found guilty of first degree murder. Instead, the amendment simply provides that the existence of one or more aggravating circumstances must now be determined by a jury, instead of by a judge, unless the right to a jury determination is waived by the defendant.

Early in our history, this court twice considered a first degree murder prosecution affected by legislative changes in Nebraska's capital sentencing statutes, *Marion v. State*, 16 Neb. 349, 20 N.W. 289 (1884) (*Marion I*), and *Marion v. State*, 20 Neb. 233, 29 N.W. 911 (1886) (*Marion II*). In April 1883, Jackson Marion was indicted for a murder committed in May 1872. He was subsequently tried, convicted, and sentenced to death. In his initial appeal to this court, we determined that at the time of the crime, murder was defined by statute as “‘the unlawful killing of a human being, with malice aforethought, either express or implied,’” and that the prescribed punishment was death or life imprisonment, as determined by the jury trying the case. *Marion I*, 16 Neb. at 351-52, 20 N.W. at 290. After the alleged murder and before Marion's trial, the statute defining murder was amended to define first and second degree murder, with death as the sole prescribed punishment for the former. Marion was tried for first degree murder under the amended statute. This court reversed the conviction, holding that the application of the amended statute violated the ex post facto clause. Because at the time the murder was committed the possible punishment for first degree murder was either life imprisonment or death, but the only possible punishment at the time defendant was tried was death, we determined that it was “evident that the law under which [defendant] was tried ‘inflicts a greater punishment than the law annexed to the crime when committed.’” *Marion I*, 16 Neb. at 354, 20 N.W. at 291.

Upon remand, Marion was retried, convicted, and again sentenced to death. He appealed from that conviction. See *Marion II*.

In affirming that conviction, this court addressed whether a provision of the criminal code in effect at the time of the murder should have been applied at trial. The provision stated that “‘juries in all cases shall be judges of the law and the fact.’” *Marion II*, 20 Neb. at 247, 29 N.W. at 918. The provision had been repealed prior to trial. This court noted that the issue presented was “whether or not the right to have the jury pass upon the law was one of which [defendant] could not legally be deprived; the law being in force at the time of the alleged homicide.” *Id.* Recognizing the decision in *Marion I*, this court analyzed whether the repeal of the provision “disadvantage[d]” defendant in any way. *Id.* at 248, 29 N.W. at 919. This court concluded:

The procedure only has been changed. The degree of punishment, the character of the offense, and the rules of evidence, remain as under the former law. It may be observed that the only change in the law is to provide another tribunal to pass upon the law of the case. Prior to the change, if the words in the former code are to be taken at their full meaning and import, the jury were the judges as to the law of a case on trial. After the change the court sits in that capacity and is the judge of the law. No vested right of [defendant] is affected. A new tribunal may be erected, or a new jurisdiction given to try him, and no right is abridged.

Id. at 248-49, 29 N.W. at 919. This court further noted that “[r]emedies must always be under the control of the legislature, and it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice, and heard only by the courts in existence when its facts arose.” *Id.* at 249, 29 N.W. at 919.

In much the same manner, the most recent amendment to our capital sentencing statutes which reassigns responsibility for determining the existence of any aggravating circumstance from judges to juries effects a procedural change in the law which applies to all proceedings which occur after the effective date of the amendment. See, also, *Brice v. State*, 815 A.2d 314 (Del. Supr. 2003) (finding post-*Ring* change in Delaware statute making jury’s determination of existence of aggravating factors binding upon trial judge was procedural change). Thus, the capital sentencing procedures as amended by L.B. 1 apply to the new

penalty phase proceeding which is necessitated in this case by *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

(iii) *Ex Post Facto Challenge*

[10] Gales also contends that because § 1 of L.B. 1 amended the penalty for a Class IA felony from “Life imprisonment” to “Life imprisonment without parole,” application of the amendment would subject him to a more onerous penalty than he faced at his first sentencing in violation of constitutional ex post facto principles. Both U.S. Const. art. I, § 10, and Neb. Const. art. I, § 16, provide that no ex post facto law may be passed. A law which purports to apply to events that occurred before the law’s enactment, and which disadvantages a defendant by creating or enhancing penalties that did not exist when the offense was committed, is an ex post facto law and will not be endorsed by the courts. *State v. Gray*, 259 Neb. 897, 612 N.W.2d 507 (2000); *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999). This ex post facto analysis applies when a statutory amendment changes the punishment of a crime. *Id.*

[11] If, in a subsequent amendment on the same or similar subject, the Legislature uses different terms in the same connection, a court interpreting the subsequent enactment must presume that the Legislature intended a change in the law. *Johnson v. Kenney*, ante p. 47, 654 N.W.2d 191 (2002). Because the language used in L.B. 1 to describe the minimum penalty for first degree murder is clearly different than the prior statutory language, we presume that the Legislature intended to change the minimum penalty. For this reason, we conclude that subjecting Gales to the enhanced minimum sentence of life without parole upon remand for resentencing would violate ex post facto principles.

[12] Contrary to Gales’ assertions, however, this conclusion does not necessitate a finding that none of the provisions of L.B. 1 may be constitutionally applied to him upon resentencing. To determine whether an unconstitutional portion of a statute may be severed, an appellate court considers (1) whether a workable statutory scheme remains without the unconstitutional portion, (2) whether valid portions of the statute can be enforced independently, (3) whether the invalid portion was the inducement to

passage of the statute, (4) whether severing the invalid portion will do violence to the intent of the Legislature, and (5) whether the statute contains a declaration of severability indicating that the Legislature would have enacted the bill without the invalid portion. See *State ex rel. Stenberg v. Omaha Expo. & Racing*, 263 Neb. 991, 644 N.W.2d 563 (2002). In this regard, § 18 of L.B. 1 expressly provides that “[i]f any section in this act or any part of any section is declared invalid or unconstitutional, the declaration shall not affect the validity or constitutionality of the remaining portions.” It is also clear that a workable statutory scheme remains if the “without parole” amendments to L.B. 1 are not applied to Gales. After considering all of the factors, we conclude that although the “without parole” amendments cannot apply to Gales upon resentencing, application of the remaining provisions of L.B. 1 will not violate ex post facto principles. Thus, on remand, Gales is subject to a minimum punishment of life imprisonment.

(iv) Scope of L.B. 1’s Application Upon Remand

Gales argues that even if the changes in L.B. 1 are procedural in nature, they cannot apply upon remand because his conviction has not been vacated. This argument is premised upon a misunderstanding of the relief granted by this appeal. Gales alleges, and this court has found, no trial error occurring prior to the acceptance of the guilty verdict and the entry of the judgment of conviction. The only error alleged and found to exist in this appeal occurred during the sentencing phase when the requirements of *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), were not met because the judge, rather than the jury, determined the existence of statutory aggravators. Therefore, the only new proceedings in this cause on remand will be those directly relating to the determination of the existence of aggravating circumstances and resentencing.

[13] Section 29-2520, as amended by L.B. 1, § 11, is the new statutory procedure for the determination of the existence of aggravating circumstances by a jury. We recognize that this procedure is triggered by the filing of a “notice of aggravation,” pursuant to Neb. Rev. Stat. § 29-1603 (Reissue 1995), as amended by L.B. 1, § 5, and that no such notice was filed in this case. As amended by § 5 of L.B. 1, § 29-1603 provides in pertinent part:

(2)(a) Any information charging a violation of section 28-303 and in which the death penalty is sought shall contain a notice of aggravation which alleges one or more aggravating circumstances, as such aggravating circumstances are provided in section 29-2523. The notice of aggravation shall be filed as provided in section 29-1602. It shall constitute sufficient notice to describe the alleged aggravating circumstances in the language provided in section 29-2523.

(b) The state shall be permitted to add to or amend a notice of aggravation at any time up to and including the thirtieth day prior to the trial of guilt.

The filing of a notice of aggravation is a new procedure established by L.B. 1. There was no such requirement at the time the information in this case was filed, or at any time prior to Gales' trial and original sentencing. Under the former statute, the State was not constitutionally required to provide a defendant with notice as to which particular aggravating circumstance or circumstances it would rely upon in pursuing the death penalty. *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000); *State v. Reeves*, 234 Neb. 711, 453 N.W.2d 359 (1990), *judgment vacated* 498 U.S. 964, 111 S. Ct. 425, 112 L. Ed. 2d 409. While procedural statutes do apply to pending litigation, it is a general proposition of law that new procedural statutes have no retroactive effect upon any steps that may have been taken in an action before such statutes were effective. *State v. Russell*, 194 Neb. 64, 230 N.W.2d 196 (1975). All things performed and completed under the old law must stand. *Id.* We conclude that because the pretrial and trial "steps" of Gales' litigation were completed and became final at a time when the law did not require the State to file a notice of aggravation in order to seek the death penalty, this new procedural requirement is not applicable to Gales.

The district court is therefore directed to conduct proceedings pursuant to § 29-2520, as amended by L.B. 1, in order to determine whether aggravating circumstances exist with respect to each of the two murders committed by Gales. Such determination will be made by a jury impaneled for this purpose, unless waived by Gales. See L.B. 1, § 11 (to be codified as § 29-2520(2)(b)(ii)). The scope of such proceedings will be limited in that the State

may seek to prove only those aggravating circumstances which were determined to exist in the first trial, and as to which Gales is therefore on notice. With respect to the murder of Latara, these include only the aggravating circumstances specified in L.B. 1, § 15 (to be codified as § 29-2523(1)(a), (b), (d), and (e)). With respect to the murder of Tramar, the State may seek to prove only the aggravating circumstances specified in L.B. 1, § 15 (to be codified as § 29-2523(1)(a), (b), and (e)). Upon completion of this proceeding, the district court is directed to resentence Gales pursuant to L.B. 1, § 11 (to be codified as § 29-2520(h)), or L.B. 1, §§ 12 and 14 (to be codified as §§ 29-2521 and 29-2522), with a minimum sentence of life imprisonment.

VI. CONCLUSION

Gales has assigned no error with respect to his conviction and sentence on the charge of attempted second degree murder, and we therefore affirm that portion of the judgment of the district court.

Gales has assigned no error with respect to the guilt phase of his trial on two counts of first degree murder, and we therefore do not disturb the guilty verdicts returned by the jury on those counts or the entry of judgment of conviction thereon by the district court. However, based upon the intervening decision of the U.S. Supreme Court in *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), we conclude that reversible error occurred at the penalty phase of the first degree murder prosecution because a judge, rather than a jury, made the finding that statutory aggravating circumstances existed. We therefore vacate Gales' death sentences on both counts of first degree murder and remand the cause to the district court with directions to conduct a new penalty phase hearing and to resentence Gales on those counts.

The provisions of L.B. 1 shall apply to Gales' new penalty phase hearing, with the following qualifications: First, the minimum penalty to which Gales may constitutionally be exposed on resentencing is life imprisonment, not life imprisonment without parole. Second, at the aggravation hearing to be conducted on remand pursuant to § 29-2520 as amended by L.B. 1, the State may seek to prove only those aggravating circumstances specified

in L.B. 1, § 15, to be codified as § 29-2523(1)(a), (b), (d), and (e), with respect to the murder of Latara, and the aggravating circumstances specified in L.B. 1, § 15, to be codified as § 29-2523(1)(a), (b), and (e), with respect to the murder of Tramar.

To the extent that pending motions of the parties seek appellate relief which is not specifically ordered herein, the motions are denied.

AFFIRMED IN PART, AND IN PART VACATED
AND REMANDED WITH DIRECTIONS FOR
NEW PENALTY PHASE HEARING AND
RESENTENCING ON COUNTS I AND II.

STOETZEL & SONS, INC., APPELLANT, v. CITY OF HASTINGS
AND BOARD OF PUBLIC WORKS, APPELLEES.

658 N.W.2d 636

Filed March 28, 2003. No. S-01-1379.

1. **Equity: Appeal and Error.** An action for injunction sounds in equity.
2. **Actions: Equity: Public Meetings: Appeal and Error.** Actions for relief under the public meetings law are tried as equitable cases, given that the relief sought is in the nature of a declaration that action taken in violation of the laws is void or voidable. Thus, the approach taken is that such cases are tried and reviewed by the appellate courts as equity cases.
3. **Equity: Appeal and Error.** In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
4. **Summary Judgment.** Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
5. **Directed Verdict: Appeal and Error.** When a motion for directed verdict made at the close of all the evidence is overruled by the trial court, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, and the issues should be decided as a matter of law.
6. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law,

which requires the appellate court to reach a conclusion independent of the lower court's decision.

7. **Moot Question.** A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the outcome of litigation.
8. **Moot Question: Words and Phrases.** A moot case is one which seeks to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive.
9. **Moot Question.** As a general rule, a moot case is subject to summary dismissal.
10. **Injunction.** Injunctive relief is preventive, prohibitory, or protective, and equity usually will not issue an injunction when the act complained of has been committed and the injury has been done.
11. **Moot Question: Appeal and Error.** The public interest exception to the rule precluding consideration of issues on appeal because of mootness requires the consideration of the public or private nature of the question presented, the desirability of an authoritative adjudication for guidance of public officials, and the likelihood of recurrence of the same or a similar problem.
12. **Public Meetings.** To preserve an objection that a public body failed to make documents available at a public meeting as required by Neb. Rev. Stat. § 84-1412(8) (Cum. Supp. 2002), a person who attends a public meeting must not only object to the violation, but must make that objection to the public body or to a member of the public body.

Appeal from the District Court for Adams County: TERRI HARDER, Judge. Affirmed.

Christopher D. Curzon, of Dwyer, Smith, Gardner, Lazer, Pohren, Rogers & Forrest, for appellant.

Robert T. Gritit, of Baylor, Evnen, Curtiss, Gritit & Witt, L.L.P., and Stephen A. Scherr, of Whelan & Scherr, for appellees.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, McCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

The appellant, Stoetzel & Sons, Inc. (Stoetzel), bid on a contract to construct a service department warehouse for the City of Hastings (City). At an open meeting held on November 13, 1998, the board of public works (Board) accepted the lower bid of a competing contractor. Stoetzel claims it is entitled to injunctive relief because of alleged irregularities in the bidding process. It also claims that the Board violated the public meetings law by failing to make the submitted bids available at the November 13 meeting. See Neb. Rev. Stat. § 84-1412(8) (Cum. Supp. 2002).

The district court granted summary judgment for the City on Stoetzel's cause of action for injunctive relief and directed a verdict for the City on the public meetings law cause of action. Because we conclude that the cause of action for injunctive relief is moot and that Stoetzel waived its public meetings law cause of action, we affirm.

FACTUAL BACKGROUND

BID PROPOSAL AND SPECIFICATIONS

In 1998, the Board authorized Hastings Utilities to let bids for the construction of a service department warehouse. The Board directs the operations of Hastings Utilities for the City. The Hastings Utilities staff prepared a document entitled "Bid Proposal and Specifications" and distributed it to prospective bidders. The document divided the warehouse project into three sections: section I was a prefabricated metal building, section II was the site work, and section III was a pond ash fill. Bidders could bid on any one or all of the sections.

The bid proposal and specifications set out instructions for how the bids were to be made. These instructions stated, "All Proposals shall be submitted on the Proposal forms hereto attached" Stoetzel contends that the instructions and the proposal forms required a unit-price bid, rather than a lump-sum bid, for each section of the project for which a contractor submitted a bid. A unit-price bid requires the bidder to itemize the elements and materials of a project. By contrast, a lump-sum bid is a single bid for the full amount of a project. Stoetzel argues that it is entitled to injunctive relief because the City gave other bidders oral permission to submit lump-sum bids on section I of the warehouse without timely notifying Stoetzel of the change.

The parties dispute to what extent the City could alter or waive the requirements in the bid proposal and specifications. It provided that Hastings Utilities reserves the right (1) to accept the proposal which best suits its needs whether the price is the lowest or not, (2) to reject any or all bids, (3) to waive any informalities, and (4) to reject any and all proposals and to waive technical errors as may be deemed best for the interest of the City. The City argues that under these provisions, Hastings Utilities was responsible for the bidding process and had broad discretion to waive

errors and alter the bidding requirements. Stoetzel conceded that the City had the authority to waive minor errors or omissions, but contends that the actions taken by the City went beyond this authority. It also argues that under the bid proposal and specifications, any changes to the bidding instructions had to be in writing.

BIDDING PROCESS

The bidding was set to close on November 10, 1998. On November 6, a representative of Westland Building Company (Westland), one of the competing bidders, telephoned Marty Stange, Hastings Utilities' chief civil and environmental engineer. The representative told Stange that Westland was having difficulty "getting all the subcontractor prices." Stange told the representative that Westland did not have to fill out every unit price, but warned that if Westland did not fill out the unit prices, it "should take that as an exception at [its] own risk."

According to Stange, on November 9, 1998, he contacted another bidder, Farris Construction, Inc. (Farris), and told it that, like Westland, it did not have to fill out every unit price if it was having difficulty getting information from subcontractors. Stoetzel was also notified that it did not have to fill out every unit price, but the parties dispute when it received the information. The City claims that an employee of Hasting Utilities telephoned Stoetzel and left a message with someone on November 9. Stoetzel claims that it never received the message and was not notified of the change until November 10, 2 to 3 hours before the bids were due.

Six bidders eventually submitted sealed bids for all or part of the service department warehouse project. Stoetzel bid on sections I and II of the project. It is undisputed that Stoetzel's bid complied with the requirements of the original bid proposal and specifications. Two other bidders, Westland and Farris, bid on section I. Both submitted lump-sum, rather than unit-price, bids. Of the three bids, Westland's was the lowest, Farris' was the second lowest, and Stoetzel's was the highest.

Stoetzel, Westland, Farris, and Werner Construction (Werner) submitted bids on section II of the project. Both Farris and Westland submitted unit-price bids for section II. Werner's bid was the lowest, and Stoetzel's bid was the second lowest.

The bids were opened on November 10, 1998. Later that day, Stange telephoned Westland and requested several unit prices so that he could evaluate Westland's lump-sum bid on section I of the project. Stange wrote these estimates on Westland's bid. Stoetzel argues that in requesting and writing down the unit prices, Stange acted inconsistently with several provisions of the bid proposal and specifications.

On November 11, 1998, Hastings Utilities released a table identifying the bidders and the amounts of their bids. In an accompanying report, Hastings Utilities recommended to the Board that Westland be awarded section I of the project and that Werner be awarded section II. The Board accepted these recommendations at an open meeting on November 13. This meeting is discussed in greater detail below.

NOVEMBER 13, 1998, BOARD MEETING

As previously noted, the Board held a regularly scheduled open meeting on November 13, 1998. During the meeting, the Board discussed the bids on the warehouse project and accepted Hastings Utilities' recommendations. Stoetzel now complains that the November 13 meeting failed to comply with the public meetings law. See Neb. Rev. Stat. § 84-1408 et seq. (Reissue 1999 & Cum. Supp. 2002).

Stoetzel complains that the City violated § 84-1412(6) (Reissue 1999), which provided, at the time of the meeting, that "[p]ublic bodies shall make available at the meeting, for examination and copying by members of the public, at least one copy of all reproducible written material to be discussed at an open meeting." Isadore H. Stoetzel (Isadore), the owner of Stoetzel, attended the November 13, 1998, meeting and expressed his concerns that the bidding process had been unfair. According to Isadore, the only document circulated at the meeting was the summary of the bids prepared by Hastings Utilities. He complains that under § 84-1412(6), the underlying bids should also have been made available.

Isadore admitted that before the Board adjourned, he did not object to the fact that the bids were unavailable. According to Isadore, immediately after the Board adjourned, he approached Stange and requested that he be allowed to see the bids. Stange

refused and directed Isadore to Marvin Schultes, the Hastings Utilities' manager. Isadore then contacted Schultes and asked to see the bids. Schultes refused. Although Schultes and Stange were present at the meeting, neither was a member of the Board. No evidence suggests that Isadore expressed his desire to see the bids to a Board member either before or after the Board adjourned.

Since the board meeting, the Legislature has amended § 84-1412(6), and it has been moved to § 84-1412(8). The differences between §§ 84-1412(6) (Reissue 1999) and 84-1412(8) (Cum. Supp. 2002) are not material for the purposes of this appeal, and to simplify our discussion, we will hereinafter refer to § 84-1412(8) only.

PROCEDURAL BACKGROUND

On December 8, 1998, the City executed a contract with Westland. Construction on the warehouse apparently began shortly thereafter.

Stoetzel initially filed this action on December 30, 1998, and filed an amended petition on May 25, 1999. The amended petition named the City, the Board, and Westland as defendants. Although Westland was named as a defendant, it apparently did not receive a summons.

In its amended petition, Stoetzel alleged four causes of action. In its first cause of action, it sought a permanent injunction and alleged that the City, "without proper authority to do so pursuant to the Bid Documents it approved, orally amended the terms of the Bid Documents to provide for a 'lump sum' bid and failed to give proper notice to Plaintiff." In its second cause of action, specific performance, Stoetzel alleged that it was the only bidder which followed the bidding requirements and that it was entitled to have the contract awarded to it. For its third cause of action, Stoetzel sought to void the Board's acts in approving and ratifying the contract because the November 13, 1998, meeting violated the public meetings law. In its fourth cause of action, Stoetzel sought to recover lost profits.

On May 26, 1999, Stoetzel moved for a temporary injunction. The court held a hearing on the temporary injunction on June 28. By this time, Westland had completed a substantial portion of the project and the City had paid about 40 percent of the contract

price to Westland. The court denied the temporary injunction on August 2, reasoning that the “motion [was] neither timely nor appropriate under the facts of the case.”

At some point after the denial of the temporary injunction but before trial, Westland was dismissed from the action. The record does not show why or the exact date of the dismissal, and Westland is not a party to this appeal.

In November 1999, both Stoetzel and the City moved for summary judgment. On January 25, 2001, the court granted partial summary judgment for the City on Stoetzel’s causes of action for injunctive relief, specific performance, and lost profits, but concluded that a genuine issue of material fact existed on the public meetings law cause of action.

Final payment for the warehouse project was made in February 2000. By the time of trial, the project was complete.

Trial on the public meetings law cause of action was held on October 29, 2001. At the close of Stoetzel’s evidence, the court entered a directed verdict for the City. The court held that to maintain an action for the failure of a public body to produce documents at a public meeting, a party must have requested the documents during the meeting. The court rejected Stoetzel’s argument that Isadore had preserved its cause of action by requesting the bids from Stange and Schultes immediately after the Board adjourned. The court also found that Stoetzel failed to prove that the documents it sought were not available at the meeting.

ASSIGNMENTS OF ERROR

Stoetzel assigns as error the court’s entry of (1) summary judgment on its cause of action for injunctive relief and (2) directed verdict on its public meetings law cause of action.

STANDARD OF REVIEW

[1,2] An action for injunction sounds in equity. *Reichert v. Rubloff Hammond, L.L.C.*, 264 Neb. 16, 645 N.W.2d 519 (2002). Actions for relief under the public meetings law are tried as equitable cases, given that the relief sought is in the nature of a declaration that action taken in violation of the laws is void or voidable. Thus, the approach taken is that such cases are tried and reviewed by the appellate courts as equity cases. *Hauser v. Nebraska Police Sds. Adv. Council*, 264 Neb. 944, 653 N.W.2d 240 (2002).

[3] In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Id.*

[4] Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Skinner v. Ogallala Pub. Sch. Dist. No. 1*, 262 Neb. 387, 631 N.W.2d 510 (2001).

[5] When a motion for directed verdict made at the close of all the evidence is overruled by the trial court, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, and the issues should be decided as a matter of law. *Jay v. Moog Automotive*, 264 Neb. 875, 652 N.W.2d 872 (2002).

[6] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision. *Fischer v. Cvitak*, 264 Neb. 667, 652 N.W.2d 274 (2002).

ANALYSIS

On appeal, Stoetzel does not assign as error the entry of summary judgment on its claims for specific performance and lost profits. It does, however, assign as error the entry of summary judgment on its cause of action for injunctive relief and the entry of a directed verdict on its public meetings law cause of action. We address these two causes of action separately.

INJUNCTIVE RELIEF

Stoetzel sought to enjoin the execution of the contract with Westland and the construction of the service warehouse because of alleged irregularities in the bidding process. Before reaching the merits of Stoetzel's argument that the court erred in granting

summary judgment on its cause of action for injunctive relief, we must determine if the completion of the service warehouse has rendered the issue moot.

[7-9] A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the outcome of litigation. *Putnam v. Fortenberry*, 256 Neb. 266, 589 N.W.2d 838 (1999). A moot case is one which seeks to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive. *Id.* As a general rule, a moot case is subject to summary dismissal. *Id.*

[10] On several previous occasions, we have addressed situations where the action a party is seeking to enjoin has been completed before we can review the lower court's decision. See, e.g., *Prucha v. Kahlandt*, 260 Neb. 366, 618 N.W.2d 399 (2000); *Putnam v. Fortenberry*, *supra*; *Koenig v. Southeast Community College*, 231 Neb. 923, 438 N.W.2d 791 (1989). We have recognized that "injunctive relief is preventive, prohibitory, or protective, and equity usually will not issue an injunction when the act complained of has been committed and the injury has been done." *Putnam v. Fortenberry*, 256 Neb. at 270, 589 N.W.2d at 842-43. We have also said:

"'Since the purpose of an injunction is not to afford a remedy for what is past but to prevent future mischief, not being used for the purpose of punishment or to compel persons to do right but merely to prevent them from doing wrong, rights already lost and wrongs already perpetrated cannot be corrected by injunction.'"

Id. at 271, 589 N.W.2d at 843 (quoting *Conrad v. Kaup*, 137 Neb. 900, 291 N.W. 687 (1940)).

In *Putnam*, the plaintiff sought to enjoin the City of Lincoln from selling a publicly owned hospital to a private company. A few days after the plaintiff had brought her action, the city council passed an ordinance approving the sale. Within 3 weeks, the city and the private company had entered into an affiliation agreement that set a closing date. Three weeks later, the court denied the plaintiff's request for temporary and permanent injunctive relief. Before the plaintiff appealed, the city and the private company had closed the sale and the title to the

hospital was transferred. The record did not reveal a stay or a supersedeas bond before or after the filing of the notice of appeal. *Id.* We said “[b]ecause the act which [the plaintiff] sought to enjoin is complete, our opinion on the trial court’s denial of injunction would be nugatory. We, therefore, conclude that the issue of injunctive relief is moot.” *Id.* at 272, 589 N.W.2d at 843.

Here, Stoetzel waited 6 weeks after the November 13, 1998, meeting before filing suit. By that time, the City had executed the contract with Westland. Although it was aware that Westland had begun construction on the warehouse, Stoetzel waited 6 months before seeking a temporary injunction. By that time, the construction was almost 50 percent complete. After the court denied its temporary injunction, Stoetzel waited almost 15 months before moving for summary judgment. By the time Stoetzel moved for summary judgment, the warehouse was complete and the contract with Westland was fully executed. The record does not show either a stay or a supersedeas bond filed before or after the filing of the notice of appeal.

The actions which Stoetzel sought to enjoin—the execution of the contract with Westland and the construction of the warehouse—have long been completed and, just as in *Putnam v. Fortenberry*, 256 Neb. 266, 589 N.W.2d 838 (1999), any opinion would be worthless. In short, the “‘bell has been rung,’” and no court in Nebraska could “‘unring it.’” *Knaust v. City of Kingston N.Y.*, 157 F.3d 86, 88 (2d Cir. 1998) (quoting *CMM Cable Rep. v. Ocean Coast Properties, Inc.*, 48 F.3d 618 (1st Cir. 1995)). See, also, *Bayou Liberty Ass’n, Inc. v. U.S. Army Corps of Engineers*, 217 F.3d 393, 396 (5th Cir. 2000) (“[w]hen a party seeks an injunction to halt a construction project the case may become moot when a substantial portion of that project is complete”); *Winter Brothers v. City of Beresford*, 652 N.W.2d 99 (S.D. 2002); *Natick Auto Sales, Inc. v. DPGS*, 47 Mass. App. 625, 715 N.E.2d 84 (1999). Thus, we conclude that Stoetzel’s cause of action for injunctive relief is moot.

As a general rule, a moot case is subject to summary dismissal. *Putnam v. Fortenberry*, *supra*. Nebraska, however, recognizes a public interest exception to the mootness doctrine, and we must consider whether the exception applies to this case. See

Koenig v. Southeast Community College, 231 Neb. 923, 438 N.W.2d 791 (1989).

[11] The public interest exception to the rule precluding consideration of issues on appeal because of mootness requires the consideration of the public or private nature of the question presented, the desirability of an authoritative adjudication for guidance of public officials, and the likelihood of recurrence of the same or a similar problem. *Putnam v. Fortenberry*, *supra*. If we were to reach the merits of Stoetzel's cause of action for an injunction, it would require an analysis of factors unique to this case. Such factors would include the proper interpretation of the terms of the bid proposal and specifications, the conduct of Stange before and after the bids, and the failure of Stoetzel to expedite the litigation. It is unlikely that we will be presented with a similar factual situation. We decline to apply the public interest exception to the mootness doctrine.

PUBLIC MEETING

Stoetzel claims that the Board violated the public meetings law, § 84-1408 et seq. The court directed a verdict for the City on this cause of action.

Section 84-1414(1) requires a court to declare any formal action taken by a public body in violation of the public meetings law void if the suit is commenced within 120 days of the meeting at which the violation occurred. Stoetzel claims that the Board's acceptance of the bids at the November 13, 1998, meeting violated § 84-1412(8), which states that "[p]ublic bodies shall make available at the meeting . . . for examination and copying by members of the public, at least one copy of all reproducible written material to be discussed at an open meeting." At the November 13 meeting, the Board discussed only the bid summary and the recommendations prepared by Hastings Utilities. Stoetzel concedes that the Board made both of these documents available to the public at the meeting. It argues, however, that the City violated § 84-1412(8) by failing to make the underlying bids available at the November 13 meeting of the Board as well.

The City, however, argues that even if the Board violated § 84-1412(8), Stoetzel waived its right to challenge the alleged violation. The trial court's order directing a verdict for the City is

somewhat ambiguous, but it appears that the City's waiver argument was at least one reason for the court's decision. Accordingly, we address the question.

In several prior cases, we have recognized that when a person attends a public meeting and fails to object to a purported violation of the public meetings law, that person is prevented from asserting the violation in a subsequent court action. See, *Hauser v. Nebraska Police Stds. Adv. Council*, 264 Neb. 944, 653 N.W.2d 240 (2002); *Wasikowski v. Nebraska Quality Jobs Bd.*, 264 Neb. 403, 648 N.W.2d 756 (2002); *Otey v. State*, 240 Neb. 813, 485 N.W.2d 153 (1992); *Witt v. School District No. 70*, 202 Neb. 63, 273 N.W.2d 669 (1979); *Alexander v. School Dist. No. 17*, 197 Neb. 251, 248 N.W.2d 335 (1976). The rule recognizes that a timely objection permits "the public body to remedy its mistake promptly and defer formal action until" the deficiency can be rectified. *Hauser v. Nebraska Police Stds. Adv. Council*, 264 Neb. at 949, 653 N.W.2d at 244.

The same reasoning is equally applicable to violations of § 84-1412(8). If a person who attends a public meeting believes that § 84-1412(8) requires that documents be made available at the meeting, a timely objection will give the Board an opportunity to remedy the situation.

Here, the parties dispute whether Isadore made a timely objection. Isadore did not request to see the documents until immediately after the Board adjourned. The City argues that an objection to a violation of § 84-1412(8) must be made during the meeting and that the meeting ends when the public body adjourns. Stoetzel argues that a meeting begins when a majority of public officials have begun to arrive, mingle, and prepare for the meeting and that it ends when a majority of public officials are no longer mingling after the meeting.

However, we find it unnecessary to reach the question of when an objection to a violation of § 84-1412(8) must be made. When Isadore requested to see the underlying bids, he did not make the request to a Board member. Instead, after the meeting, he approached Stange, a Hastings Utilities engineer. Stange refused to let him see the bids, but directed him to Schultes, the Hastings Utilities manager. Schultes also declined to show the bids to

Isadore. Although both Stange and Schultes were at the meeting, neither were Board members.

It is implicit in our rule requiring a person attending a public meeting to object to a public meetings law violation that the objection must be made to the public body or to a member of the public body. Section 84-1412(8) creates duties running directly from public bodies to members of the public. If the objection is made directly to the public body or to a member of the public body, it guarantees that the public body has an opportunity to consider and correct any alleged violation. But if the objection is made to a public employee or to another member of the public who is at the meeting, there is no guarantee that the public body will receive the objection and have the opportunity to correct it.

[12] We hold that to preserve an objection to a § 84-1412(8) violation, a person who attends a public meeting must not only object to the violation, but must make that objection to the public body or to a member of the public body. Because Isadore never made his request to see the bid documents to a Board member, he waived his claim that the Board violated § 84-1412(8).

CONCLUSION

Stoetzel's cause of action for injunctive relief is moot, and it waived its public meetings law cause of action. Accordingly, we affirm.

AFFIRMED.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE
OF THE NEBRASKA SUPREME COURT, RELATOR, v.
JAMES C. HART, JR., RESPONDENT.

658 N.W.2d 632

Filed March 28, 2003. No. S-02-921.

Original action. Judgment of public reprimand.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN,
McCORMACK, and MILLER-LERMAN, JJ.

PER CURIAM.

INTRODUCTION

On August 19, 2002, formal charges were filed by the office of the Counsel for Discipline of the Nebraska Supreme Court, relator, against respondent, James C. Hart, Jr. Respondent's answer disputed the allegations. A referee was appointed and heard evidence. The referee filed a report on February 5, 2003. With respect to the single count in the formal charges, the referee concluded that respondent's conduct had breached disciplinary rules of the Code of Professional Responsibility. The referee did not make any determination as to whether respondent's conduct violated his oath as an attorney. See Neb. Rev. Stat. § 7-104 (Reissue 1997). The referee recommended that respondent should be publicly reprimanded. Neither relator nor respondent filed exceptions to the referee's report.

FACTS

Respondent was admitted to the practice of law in the State of Nebraska in 1972. He has practiced in Douglas County.

The substance of the referee's findings may be summarized as follows: The single count of the formal charges involves respondent's handling of a client's employment discrimination claims. The detailed facts as found by the referee are not disputed by the parties and are not repeated here. In sum, the facts show that from May to October 5, 2001, respondent undertook to represent Vicky Wright with regard to her employment discrimination claims. The referee found that on or about October 5, respondent wrote to Wright and advised her that he was withdrawing as counsel. The referee found that in the course of respondent's representation of Wright, respondent failed to contact relevant agencies concerning Wright's discrimination claims, failed to discuss Wright's claims with her former employer or former coworkers, failed to review documents provided to him by Wright, failed to conduct any research on Wright's claims, and failed to advise Wright of any statute of limitations issues. The referee also found that respondent failed to communicate in a timely manner with Wright regarding her discrimination claims, failed to withdraw from his representation of Wright in a timely manner, and failed to refer Wright to

other attorneys practicing in the area or to otherwise protect Wright's interests as those interests were affected by respondent's withdrawal as counsel. The referee found by clear and convincing evidence that as a result of respondent's conduct, respondent had violated Canon 1, DR 1-102(A)(1) (disciplinary rule violation); Canon 6, DR 6-101(A)(3) (neglect); and Canon 7, DR 7-101(A)(2) (failure to carry out contract of employment with client for professional services). The referee also found, however, that contrary to the allegations of paragraph 15 in the formal charges, relator had failed to prove that any "'time for filing suit [based on Wright's employment discrimination claims] had expired.'"

In his report, the referee specifically found by clear and convincing evidence that respondent had violated the disciplinary rules recited above. With respect to the sanction which ought to be imposed for the foregoing violations, and considering the mitigating factors the referee found present in the case, the referee recommended that respondent should be publicly reprimanded.

ANALYSIS

In view of the fact that neither party filed written exceptions to the referee's report, relator filed a motion under Neb. Ct. R. of Discipline 10(L) (rev. 2001). When no exceptions are filed, the Nebraska Supreme Court may consider the referee's findings final and conclusive. *State ex rel. Counsel for Dis. v. Apker*, 263 Neb. 741, 642 N.W.2d 162 (2002). Based upon the findings in the referee's report, which we consider to be final and conclusive, we conclude the formal charges are supported by clear and convincing evidence.

A proceeding to discipline an attorney is a trial de novo on the record. *Apker, supra*. To sustain a charge in a disciplinary proceeding against an attorney, a charge must be established by clear and convincing evidence. *Id.* Violation of a disciplinary rule concerning the practice of law is a ground for discipline. *Id.*

Based on the record and the undisputed findings of the referee, we find that the above-referenced facts have been established by clear and convincing evidence. Based on the foregoing evidence, we conclude that by virtue of respondent's conduct, respondent has violated DR 1-102(A)(1), DR 6-101(A)(3), and

DR 7-101(A)(2). We further conclude that respondent has violated the attorney's oath of office. See § 7-104.

We have stated that “[t]he basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.” *State ex rel. NSBA v. Frank*, 262 Neb. 299, 304, 631 N.W.2d 485, 490 (2001) (quoting *State ex rel. NSBA v. Brown*, 251 Neb. 815, 560 N.W.2d 123 (1997)). Neb. Ct. R. of Discipline 4 (rev. 2001) provides that the following may be considered by the court as sanctions for attorney misconduct: (1) disbarment; (2) suspension for a fixed period of time; (3) probation in lieu of suspension, on such terms as the court may designate; (4) censure and reprimand; or (5) temporary suspension.

With respect to the imposition of attorney discipline in an individual case, we have stated that “[e]ach case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case.” *Frank*, 262 Neb. at 304, 631 N.W.2d at 490 (quoting *State ex rel. NSBA v. Rothery*, 260 Neb. 762, 619 N.W.2d 590 (2000)). For purposes of determining the proper discipline of an attorney, this court considers the attorney's acts both underlying the events of the case and throughout the proceeding. *Frank, supra*; *State ex rel. NSBA v. Freese*, 259 Neb. 530, 611 N.W.2d 80 (2000); *State ex rel. NSBA v. Denton*, 258 Neb. 600, 604 N.W.2d 832 (2000).

To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, this court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law. *Apker, supra*; *State ex rel. NSBA v. Gallner*, 263 Neb. 135, 638 N.W.2d 819 (2002).

We have noted that the determination of an appropriate penalty to be imposed on an attorney requires consideration of any mitigating factors. *Apker, supra*; *State ex rel. NSBA v. Abrahamson*, 262 Neb. 632, 634 N.W.2d 462 (2001).

The evidence in the present case establishes, inter alia, that respondent neglected a legal matter entrusted to him and failed to carry out a contract of employment entered into with the client for

professional services. As mitigating factors, we note the isolated nature of respondent's misconduct and respondent's cooperation with regard to the disciplinary proceeding.

We have considered the record, the findings which have been established by clear and convincing evidence, and the applicable law. Upon due consideration, the court agrees with the referee's recommendation and finds that respondent should be publicly reprimanded.

CONCLUSION

The motion for judgment on the pleadings is granted. It is the judgment of this court that respondent should be and hereby is publicly reprimanded. Respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997) and Neb. Ct. R. of Discipline 23(B) (rev. 2001).

JUDGMENT OF PUBLIC REPRIMAND.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE
OF THE NEBRASKA SUPREME COURT, RELATOR, v.
MICHAEL L. CRUISE, RESPONDENT.

658 N.W.2d 300

Filed March 28, 2003. No. S-02-1093.

Original action. Judgment of disbarment.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN,
McCORMACK, and MILLER-LEMAN, JJ.

PER CURIAM.

INTRODUCTION

Respondent, Michael L. Cruise, was admitted to the practice of law in the State of Nebraska on April 18, 1988. On September 25, 2002, formal charges were filed against respondent. On December 5, amended formal charges were filed. Respondent's alleged misconduct involved, inter alia, engaging in conduct that was prejudicial to the administration of justice, neglecting legal matters entrusted to him, and failing to preserve the identity of funds or property belonging to a client.

FACTS

On February 7, 2003, respondent filed with this court a voluntary surrender of license, voluntarily surrendering his license to practice law in the State of Nebraska. In his voluntary surrender of license, respondent states that he “knowingly” did not challenge or contest the truth of the allegations that he engaged in conduct that violated Canon 1, DR 1-102(A)(1) and (5); Canon 6, DR 6-101(A)(3); Canon 9, DR 9-102(A)(1) and (2); and DR 9-102(B)(1) through (4), of the Code of Professional Responsibility, as well as his oath of office as an attorney. In addition to surrendering his license, respondent voluntarily consented to the entry of an order of disbarment and waived his right to notice, appearance, and hearing prior to the entry of the order of disbarment. In surrendering his license, respondent knowingly does not challenge or contest the following allegations in the amended formal charges: that he failed to deposit clients’ funds and advanced fee payments into his attorney trust account; that he neglected three separate clients’ child support cases, by failing to file pleadings and failing to respond to discovery requests in a timely manner; that he neglected his duties as a court-appointed guardian and conservator, including failing to file an accounting for conservatorship funds in a timely manner; that he neglected a client’s personal injury case, including failing to file pleadings; that he was out of trust with respect to his attorney trust account, including maintaining a negative balance for a period of several months; and that he neglected a client’s federal court appeal, including failing to file a brief on appeal.

ANALYSIS

Neb. Ct. R. of Discipline 15 (rev. 2001) provides in pertinent part:

(A) Once a Grievance, a Complaint, or a Formal Charge has been filed, suggested, or indicated against a member, the member may voluntarily surrender his or her license.

(1) The voluntary surrender of license shall state in writing that the member knowingly admits or knowingly does not challenge or contest the truth of the suggested or indicated Grievance, Complaint, or Formal Charge and waives all proceedings against him or her in connection therewith.

Pursuant to rule 15, we find that respondent has voluntarily surrendered his license to practice law, admitted in writing that he knowingly does not challenge or contest the truth of the amended formal charges, and waived all proceedings against him in connection therewith. We further find that respondent has not challenged or contested the truth of the allegations that he engaged in conduct that violated DR 1-102(A)(1) and (5), DR 6-101(A)(3), DR 9-102(A)(1) and (2), DR 9-102(B)(1) through (4), and the attorney oath of office and that respondent has consented to the entry of an order of disbarment.

CONCLUSION

Upon due consideration of the pleadings in this matter, the court finds that respondent knowingly did not challenge or contest the truth of the allegations that he engaged in conduct that violated DR 1-102(A)(1) and (5), DR 6-101(A)(3), DR 9-102(A)(1) and (2), and DR 9-102(B)(1) through (4) and that his waiver was knowingly made. The court accepts respondent's surrender of his license to practice law, finds that respondent should be disbarred, and hereby orders him disbarred from the practice of law in the State of Nebraska, effective immediately. Respondent shall forthwith comply with Neb. Ct. R. of Discipline 16 (rev. 2001), and upon failure to do so, he shall be subject to punishment for contempt of this court. Costs to be taxed against respondent.

JUDGMENT OF DISBARMENT.

FARMERS MUTUAL INSURANCE COMPANY OF NEBRASKA, APPELLEE,
v. JOHN D. KMENT AND BRIAN M. DETLEF, APPELLANTS.

658 N.W.2d 662

Filed April 4, 2003. No. S-01-1238.

1. **Jury Instructions.** Whether a jury instruction given by a trial court is correct is a question of law.
2. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden of showing that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction.

3. **Appeal and Error.** An issue not presented to or passed on by the trial court is not appropriate for consideration on appeal.
4. **Jury Instructions: Appeal and Error.** Failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error.
5. **Jury Instructions.** The submission of proposed instructions by counsel does not relieve the parties in an instruction conference from calling the court's attention by objection to any perceived omission or misstatement in the instructions given by the court.
6. _____. The purpose of the instruction conference is to give the trial court an opportunity to correct any errors being made by it. Consequently, the parties should object to any errors of commission or omission.
7. **Jury Instructions: Appeal and Error.** It is not error for a trial court to refuse to give a requested instruction if the substance of the proposed instruction is contained in those instructions actually given.
8. **Insurance: Contracts: Proof.** The burden to prove that an exclusionary clause applies rests upon the insurer.
9. **Insurance: Contracts: Intent: Proof.** In order for the intentional or expected injury exclusion in a liability insurance policy to apply, the insurer must show that the insured acted with the specific intent to cause harm to a third party, but does not have to show that the insured intended the specific injury that occurred.
10. **Insurance: Negligence: Intent.** An injury is "expected or intended" from the standpoint of the insured if a reason for an insured's act is to inflict bodily injury or if the character of the act is such that an intention to inflict an injury can be inferred as a matter of law.
11. **Courts: Jury Instructions.** A trial court need not instruct the jury on an issue where the facts do not justify such an instruction.

Appeal from the District Court for Douglas County: SANDRA L. DOUGHERTY, Judge. Affirmed.

Norman Denenberg and James A. Mullen for appellant Brian M. Detlef.

Donald L. Stern for appellant John D. Kment.

Thomas A. Grennan and Donald P. Dworak, of Gross & Welch, P.C., for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, McCORMACK, and MILLER-LERMAN, JJ.

McCORMACK, J.

NATURE OF CASE

This is an appeal from a declaratory judgment action brought by appellee, Farmers Mutual Insurance Company of Nebraska

(FMI), against appellants, John D. Kment and Brian M. Detlef. The jury determined that the injuries sustained by Detlef were intended by Kment and that thus, FMI was not obligated under its homeowner's insurance contract issued to Kment to provide coverage. The appellants filed this appeal. The specific issue we address is whether an instruction should have been given as to the effect of voluntary intoxication by Kment. For the reasons set forth below, we affirm.

BACKGROUND

Kment owned his own house and rented the basement apartment to Detlef for \$100 per month. On January 28, 1995, Kment went down to Detlef's apartment with a 12 gauge Winchester shotgun and shot Detlef twice, which ultimately necessitated that Detlef's right hand be amputated.

Detlef sued Kment in district court. Following a bench trial, the district court entered judgment in favor of Detlef in the amount of \$1,400,000. Detlef sought to recover the amount under Kment's homeowner's insurance policy issued by FMI. FMI denied Detlef's claim, citing an exclusion in the policy which excludes coverage for intentional acts. The policy provided personal liability coverage for accidents, but not “[b]odily injury or property damage expected or intended by an insured person.” The appellants alleged that the shooting was an accident; that Kment only intended to frighten Detlef; that Kment thought the gun was unloaded at the time of the shooting; that the injury was the result of a “stupid prank,” possibly combined with alcohol; and that Kment did not intend to injure Detlef.

FMI brought the present declaratory judgment action alleging that Kment intended to injure Detlef and that there was, therefore, no coverage under the policy. Both parties moved for summary judgment, and both motions were overruled. The court found a genuine issue of material fact existed as to whether the shooting was intentional or accidental. Prior to trial, FMI filed a motion in limine seeking to exclude evidence at the trial of Kment's alleged intoxication on the day of the shooting. The court overruled FMI's motion in limine.

At the declaratory judgment trial, Kment gave conflicting testimony. He testified that he was not drunk at the time of the

incident, but also testified that he was not sober. He further testified that he intended only to take the shotgun down to Detlef's apartment to show him the gun. Thinking the gun was not loaded, Kment decided to play a joke on Detlef by aiming the gun at Detlef and pulling the trigger. The gun discharged, surprising Detlef, and a scuffle ensued between Detlef and Kment. In the scuffle, Detlef pulled on the gun, the gun discharged again, and Detlef's right hand was blown off at the wrist. A jury verdict was returned in FMI's favor determining that the injuries were "expected or intended" by Kment. This appeal followed.

ASSIGNMENTS OF ERROR

The appellants assign that the district court erred in the following: (1) refusing to give the instruction requested by Detlef that voluntary intoxication may destroy the capacity to form the intent required to invoke a policy exclusion for acts "'intended or expected'" by the insured and that the burden is on FMI to prove and persuade the jury that the injuries were within the scope of the exclusion; (2) refusing to give the requested instruction that an injury resulting from gross negligence or recklessness is not expected or intended unless there is a specific intent to harm or injure another; (3) refusing to give the tendered instruction that any reasonable doubt in interpreting the expected or intended clause of the insurance policy is to be resolved in favor of the appellants; (4) refusing to give the requested instruction that when a gun is fired intentionally with the purpose of frightening, but there was no intent to shoot a person, any resulting injury would not be expected or intended by the insured; and (5) refusing to give the requested instruction that "if the policy holder, Kment, mistakenly believed that the shotgun was not loaded, then [the jury] must find that the injury to Detlef was not expected or intended."

STANDARD OF REVIEW

[1,2] Whether a jury instruction given by a trial court is correct is a question of law. *Russell v. Stricker*, 262 Neb. 853, 635 N.W.2d 734 (2001); *Paulk v. Central Lab. Assocs.*, 262 Neb. 838, 636 N.W.2d 170 (2001); *Maxwell v. Montey*, 262 Neb. 160, 631 N.W.2d 455 (2001). To establish reversible error from a court's

failure to give a requested jury instruction, an appellant has the burden of showing that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction. *Springer v. Bohling*, 263 Neb. 802, 643 N.W.2d 386 (2002).

ANALYSIS

[3-7] Before addressing the substantive issues raised by the appellants on appeal, we first determine if the assigned errors are properly before our court. Our review is guided by the following principles of law: An issue not presented to or passed on by the trial court is not appropriate for consideration on appeal. *Torrison v. Overman*, 250 Neb. 164, 549 N.W.2d 124 (1996). Failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error. *Russell v. Stricker*; *supra*; *Maxwell v. Montey*, *supra*. The submission of proposed instructions by counsel does not relieve the parties in an instruction conference from calling the court's attention by objection to any perceived omission or misstatement in the instructions given by the court. *Haumont v. Alexander*, 190 Neb. 637, 211 N.W.2d 119 (1973). The purpose of the instruction conference is to give the trial court an opportunity to correct any errors being made by it. Consequently, the parties should object to any errors of commission or omission. *Id.* It is not error for a trial court to refuse to give a requested instruction if the substance of the proposed instruction is contained in those instructions actually given. *McLain v. Ortmeier*, 259 Neb. 750, 612 N.W.2d 217 (2000); *Kent v. Crocker*, 252 Neb. 462, 562 N.W.2d 833 (1997); *Gustafson v. Burlington Northern RR. Co.*, 252 Neb. 226, 561 N.W.2d 212 (1997).

The record in this case shows that prior to the instruction conference, Detlef's counsel submitted six instructions for the court's review. The court refused all six. On appeal, the appellants assign as error the refusal of the trial court to submit four of the six jury instructions, which we number according to the assignments of error as follows: Nos. 1, voluntary intoxication; 2, gross negligence; 4, firing a gun for the purpose of frightening; and 5, mistaken belief that the gun was loaded. Assignment of error No. 3

concerning the interpretation of the expected or intended clause of the insurance policy cannot be found in the record. Because this assignment of error was never presented to the trial court as a jury instruction, we conclude that it is not properly before this court on appeal.

At the instruction conference, 18 instructions were approved by the court, none of which included counsel's requested instructions. As to the requested instructions, the record reveals that counsel only objected to the court's refusal to submit the instruction on voluntary intoxication. Because no objection was made to the following requested instructions concerning assignments of error Nos. 2, gross negligence; 4, firing a gun for the purpose of frightening; and 5, mistaken belief that the gun was loaded, we conclude those instructions are not properly before us.

We next compare counsel's tendered jury instruction on voluntary intoxication to the submitted jury instructions. The tendered instruction was as follows: "Voluntary intoxication may destroy the capacity to form the intent required to invoke a policy exclusion for acts 'intended or expected' by the insured, and that the burden is on the carrier to prove and persuade that the injuries were within the scope of the exclusion." The instruction can be broken down into two parts: (1) the effect voluntary intoxication may have on the capacity to form intent and (2) the insurer has the burden of proof to prove that the injuries were within the scope of the exclusion. A review of the record reveals that the second part of the tendered instruction concerning the insurer's burden was submitted to the jury. Instruction No. 8 states in part: "The burden of proof is on the Plaintiff Farmers Mutual to establish by the greater weight of the evidence that the bodily injuries sustained by Defendant Detlef on January 28, 1995 were expected or intended by Defendant John Kment." The district court correctly found this to be the law of Nebraska and submitted such instruction to the jury. See *Farm Bureau Ins. Co. v. Witte*, 256 Neb. 919, 594 N.W.2d 574 (1999). Because its substance was submitted to the jury, we find the second part of the appellants' assigned error to be without merit.

Our analysis focuses only on the part of the tendered instruction rejected by the court concerning the effect voluntary intoxication may have on the capacity to form intent and its relation

to the exclusion of expected or intentional acts in the insurance policy.

[8-10] Under Nebraska law, the burden to prove that an exclusionary clause applies rests upon the insurer. *Economy Preferred Ins. Co. v. Mass*, 242 Neb. 842, 497 N.W.2d 6 (1993). The exclusion provision at issue in this case provides that “[b]odily injury or **property damage** expected or intended by an **insured person**” will not be covered. In order for the intentional or expected injury exclusion in a liability insurance policy to apply, the insurer must show that the insured acted with the specific intent to cause harm to a third party, but does not have to show that the insured intended the specific injury that occurred. *State Farm Fire & Cas. Co. v. Muth*, 190 Neb. 248, 207 N.W.2d 364 (1973). An injury is “expected or intended” from the standpoint of the insured if a reason for an insured’s act is to inflict bodily injury or if the character of the act is such that an intention to inflict an injury can be inferred as a matter of law. *Jones v. Norval*, 203 Neb. 549, 279 N.W.2d 388 (1979).

In the case at bar, the appellants allege that the district court erred in refusing to give their tendered instruction that “[v]oluntary intoxication may destroy the capacity to form the intent required to invoke a policy exclusion for acts ‘intended or expected’ by the insured.” To establish reversible error because of a trial court’s failure to give a requested jury instruction, an appellant has the burden of showing that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court’s failure to give the requested instruction. *Springer v. Bohling*, 263 Neb. 802, 643 N.W.2d 386 (2002).

[11] The district court denied the appellants’ instruction on voluntary intoxication, concluding that the evidence required for the instruction was not put in front of the jury. We agree. A trial court need not instruct the jury on an issue where the facts do not justify such an instruction. *Battle Creek State Bank v. Haake*, 255 Neb. 666, 587 N.W.2d 83 (1998). The charge as requested would have allowed the jury to decide whether Kment’s intoxication *destroyed* his capacity to form the specific intent to harm a third person. Assuming without deciding that the appellants’ tendered instruction is an accurate statement of the law, it is

clear that the evidence does not justify the charge. No evidence, empirical, expert, or otherwise, was offered to show that Kment lacked the capacity to form intent. While there is evidence that Kment may have been intoxicated, perhaps even very intoxicated, the record is devoid of any evidence that Kment was so intoxicated that he lacked the capacity to form the intent to harm another person. Exhibiting signs of intoxication is different from the inability to form an intent to injure.

Even those parts of the record that are disputed demonstrate that Kment was capable of engaging in rational thought on the night of the shooting. No witness who observed Kment on the night of the shooting testified that his conduct or conversation demonstrated any inability to form the intent to injure. Two police officers testified that after Kment's arrest immediately following the shooting, he was not confused as to time, place, and date. Neither officer indicated that Kment lacked the capacity to form the required intent. The claim that Kment was so intoxicated as to lack the capacity to form the intent to injure is implausible in light of Kment's own testimony and statements he made to the officers. The evidence shows that Kment engaged in rational thought before and after the shooting. Kment remembered retrieving the gun and going downstairs. He even recalled which lights were on downstairs and in which hand he was carrying the gun. Kment also testified that he intended to pull the trigger and that he knew what he was doing at the time of the incident.

Moreover, Kment's own theory of the case presupposes that he had the capacity to form the requisite intent. He did not claim that at the time of the shooting, he blacked out or was hallucinating. Rather, Kment testified that he intended to play a practical joke on Detlef. He went downstairs, pointed the gun at Detlef, and pulled the trigger, not knowing the gun was loaded. This presupposes that Kment was capable of rational thought. To have offered an instruction to the jury that he was so drunk that he could not have formed the requisite intent would have been inconsistent with Kment's own theory. Because the evidence did not warrant the instruction of voluntary intoxication, we conclude that the court did not err in refusing to give the requested instruction.

CONCLUSION

Having concluded that the appellants' tendered instruction on voluntary intoxication was not warranted by the evidence, we affirm the judgment of the district court.

AFFIRMED.

STEPHAN, J., not participating.

STATE OF NEBRASKA, APPELLEE, v.
KANDIE A. LEE, APPELLANT.
658 N.W.2d 669

Filed April 4, 2003. No. S-01-1321.

1. **Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress evidence, ultimate determinations of reasonable suspicion are reviewed de novo by an appellate court, while findings of historical fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge.
2. **Investigative Stops: Motor Vehicles: Probable Cause.** A traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle.
3. **Motor Vehicles: Rules of the Road.** Nebraska law provides that local authorities are permitted to place and maintain traffic control devices to indicate and to carry out provisions of the Nebraska Rules of the Road or to regulate, warn, or guide traffic.
4. ____: ____: ____: A violation of the Nebraska Rules of the Road constitutes a traffic infraction.
5. **Investigative Stops: Police Officers and Sheriffs: Motor Vehicles.** When an officer has stopped a vehicle for a traffic violation, the officer is entitled to conduct an investigation reasonably related in scope to the circumstances that justified the interference in the first place.
6. ____: ____: ____: A reasonable investigation may include asking the driver for an operator's license and registration, requesting that the driver sit in the patrol car, or asking the driver about his or her destination or purpose. A computer check may also be run to determine whether the vehicle involved in the stop has been stolen or whether there are outstanding arrest warrants for any of the individuals in the vehicle.
7. **Probable Cause: Words and Phrases.** Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized suspicion or hunch, but less than the level of suspicion required for probable cause.
8. **Investigative Stops: Police Officers and Sheriffs: Probable Cause.** Whether a police officer has a reasonable suspicion based on sufficient articulable facts requires taking into account the totality of the circumstances.
9. ____: ____: ____: A finding of reasonable suspicion must be determined on a case-by-case basis.

10. **Criminal Law: Investigative Stops: Police Officers and Sheriffs: Probable Cause.** An individual's criminal history may be a relevant factor when determining whether an officer has reasonable suspicion to detain an individual.
11. **Investigative Stops: Police Officers and Sheriffs: Probable Cause.** Nervousness, though an appropriate factor for consideration within the totality of the circumstances, is of limited significance in determining whether an officer has reasonable suspicion to detain an individual.
12. **Investigative Stops: Probable Cause.** An individual's inconsistent explanation of the reason for being at a particular location is an appropriate factor in evaluating the existence of reasonable suspicion.
13. **Investigative Stops: Police Officers and Sheriffs: Probable Cause.** The location of an individual as well as the time of day or night and year are appropriate factors in determining whether an officer has reasonable suspicion to detain an individual.
14. **Constitutional Law: Investigative Stops: Police Officers and Sheriffs: Probable Cause.** In determining whether an investigatory stop supported by reasonable suspicion is otherwise reasonable under the Fourth Amendment, a court considers both the length of the detention and the efforts of police to conduct their investigation quickly and unintrusively.
15. **Search Warrants: Affidavits: Probable Cause: Words and Phrases.** A search warrant, to be valid, must be supported by an affidavit which establishes probable cause. Probable cause sufficient to justify issuance of a warrant means a fair probability that contraband or evidence of a crime will be found.
16. **Search Warrants: Probable Cause: Proof: Time.** Proof of probable cause justifying issuance of a search warrant generally must consist of facts so closely related to the time of issuance of the warrant as to justify a finding of probable cause at that time.
17. **Search Warrants: Affidavits: Probable Cause: Appeal and Error.** In reviewing the strength of an affidavit submitted as a basis for finding probable cause to issue a search warrant, an appellate court applies a "totality of the circumstances" rule whereby the question is whether, under the totality of the circumstances illustrated by the affidavit, the issuing magistrate had a substantial basis for finding that the affidavit established probable cause. As a general rule, an appellate court is restricted to consideration of the information and circumstances found within the four corners of the affidavit.
18. **Police Officers and Sheriffs: Search Warrants: Affidavits.** When a search warrant is obtained on the strength of information received from an informant, the affidavit in support of the issuance of the warrant must set forth facts demonstrating the basis of the informant's knowledge of criminal activity, and must also either establish the informant's credibility or set forth a police officer's independent investigation of the information supplied by the informant.
19. **Search Warrants: Affidavits: Probable Cause: Appeal and Error.** Where the affidavit before the issuing magistrate contains information that an appellate court will not consider in a probable cause determination, the decision of the issuing magistrate is not entitled to deference, but, rather, must be reviewed de novo.
20. **Search Warrants: Affidavits: Probable Cause: Case Disapproved: Appeal and Error.** Although a de novo review was conducted in *State v. Ortiz*, 257 Neb. 784, 600 N.W.2d 805 (1999), to the extent that *Ortiz* could be read as giving deference to the issuing magistrate's probable cause determination after excision of averments from the search warrant affidavit, it is disapproved.

21. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it.

Appeal from the District Court for Saline County: ORVILLE L. COADY, Judge. Affirmed.

James R. Mowbray and Kelly S. Breen, of Nebraska Commission on Public Advocacy, for appellant.

Don Stenberg, Attorney General, and David Arterburn for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

PER CURIAM.

I. INTRODUCTION

Kandie A. Lee was involved in a traffic stop during which sheriff's deputies became suspicious that Lee was involved in drug activity. After a canine sniff alerted the officers to the presence of illegal drugs in Lee's vehicle, a search warrant was obtained. A search of Lee's vehicle produced methamphetamine.

Following a hearing, Lee's motion to suppress was denied. A trial was held in Saline County District Court on stipulated facts, and Lee was convicted of possession of a controlled substance. Lee was sentenced to a term of 20 months' to 5 years' imprisonment. This appeal followed. We moved this case to our docket pursuant to our authority to regulate the caseload between this court and the Nebraska Court of Appeals. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

II. FACTUAL BACKGROUND

On November 30, 2000, Sgt. Jeff Mulbery and Deputy Anthony Lytle of the Saline County sheriff's office were on routine patrol in Saline County. At approximately 9 p.m., the officers conducted a security check of the Walnut Creek Recreation Area, an area owned by the local natural resources district and operated by the Nebraska Game and Parks Commission. Information received by the Saline County sheriff's office prior to this incident indicated that "drug dealers and users are meeting at this location for drug transactions."

During this security check, Mulbery and Lytle observed a green 1993 Plymouth Laser automobile being operated in an area marked by a sign indicating there were to be no unauthorized vehicles beyond that point. This area, according to Mulbery, was not "well lighted" and was "dark." Mulbery and Lytle then stopped the vehicle, which was occupied by Lee.

Upon contacting Lee at approximately 9:03 p.m., Mulbery inquired as to why Lee was present in an area restricted to authorized vehicles. Lee's initial response was that she was there to meet her boyfriend, Stacy Talbott. According to Mulbery, Lee appeared "really nervous" while being questioned. Lytle, who had accompanied Mulbery to Lee's vehicle, requested Lee's operator's license, after which request both officers returned to the patrol car. Lytle then requested the dispatcher at the sheriff's office to run a check of Lee's operator's license. The check disclosed that there were no outstanding warrants and that Lee's operator's license was not under suspension. In addition, at approximately the same time, Mulbery contacted Deputy Kenneth Uher, requesting that Uher report to the scene with the county's drug dog. Shortly thereafter, Mulbery and Lytle received information from Uher that Lee had "prior drug arrests."

Upon being advised of Lee's prior drug arrests, Mulbery and Lytle approached Lee a second time and again asked why she was at the recreation area. This time, according to Mulbery, Lee's story "turned around." Lee now told the officers she was there to meet her boyfriend, whose name was "Johnson," and that Talbott, whom Lee had earlier identified as her boyfriend, was in fact Lee's brother. The officers then asked for consent to search Lee's vehicle, which Lee refused.

Uher and the county's drug dog arrived on the scene at 9:21 p.m. After sniffing the vehicle, the dog alerted to the presence of illegal drugs. At that point, Lee was again asked for permission to search the vehicle, and again permission was denied. Lee was then told she was free to leave, but that her vehicle would need to remain at the scene until a search warrant was obtained. After the search warrant was issued, Lee's vehicle was searched. Methamphetamine was found in Lee's purse, which was located on the front seat of the vehicle.

III. ASSIGNMENTS OF ERROR

Lee assigns, rephrased, that the district court erred in (1) failing to excise from the probable cause affidavit averments regarding a canine sniff which were the product of an illegal detention and seizure, (2) failing to grant her motion to suppress evidence found in the search of her vehicle on the ground that there was no probable cause to issue a search warrant, and (3) finding that the search of her vehicle was justified under the search incident to an arrest exception to the warrant requirement.

IV. STANDARD OF REVIEW

[1] In reviewing a trial court's ruling on a motion to suppress evidence, ultimate determinations of reasonable suspicion are reviewed *de novo* by an appellate court, while findings of historical fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge. *State v. Kelley*, *ante* p. 563, 658 N.W.2d 279 (2003).

V. ANALYSIS

Lee's primary contention is that the officers were not justified in detaining her while awaiting the arrival of the drug dog and that, therefore, "the detention of herself and her vehicle [was] illegal; and, the subsequent warrant issued was the fruit of this illegality." Brief for appellant at 6. As a result, Lee argues that any averment relating to the canine sniff must be excised from the affidavit in support of the search warrant. Lee contends that once the canine sniff is excised, the remaining averments do not support a finding of probable cause justifying the issuance of the warrant.

1. INITIAL STOP

[2-4] We determine that the initial traffic stop was valid. It is well established that a traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle. *State v. Dallmann*, 260 Neb. 937, 621 N.W.2d 86 (2000). Nebraska law provides that local authorities, including natural resources districts and the Game and Parks Commission, are permitted to "place and maintain such traffic control devices upon highways under their jurisdictions . . . to indicate and to carry out the provisions of the Nebraska Rules of the Road or to regulate, warn, or

guide traffic.” Neb. Rev. Stat. § 60-6,121 (Reissue 1998). Furthermore, Neb. Rev. Stat. § 60-682 (Reissue 1998) provides that “a violation of any provision of the rules shall constitute a traffic infraction.” Mulbery and Lytle’s observation of Lee’s vehicle in an unauthorized area provided probable cause for the officers to stop Lee.

[5,6] At the time Lee was initially stopped, the officers were entitled to conduct an investigation “‘‘reasonably related in scope to the circumstances that justified the interference in the first place.’’” *State v. Anderson*, 258 Neb. 627, 634, 605 N.W.2d 124, 131 (2000) (quoting *U.S. v. Bloomfield*, 40 F.3d 910 (8th Cir. 1994)). Such an investigation may include asking the driver for an operator’s license and registration, requesting that the driver sit in the patrol car, or asking the driver about his or her destination or purpose. *State v. Anderson*, *supra*. A computer check may also be run to determine whether the vehicle involved in the stop has been stolen or whether there are outstanding arrest warrants for any of the individuals in the vehicle. *Id.* In order to expand the scope of the traffic stop and continue to detain the person for additional investigation, an officer must have a reasonable, articulable suspicion that the person is involved in criminal activity beyond that which initially justified the interference. *Id.* See *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

We must therefore initially determine the point at which the “‘‘circumstances that justified the interference in the first place’’” ceased and continued detention began. See *State v. Anderson*, 258 Neb. at 634, 605 N.W.2d at 131.

2. POINT AT WHICH CONTINUED DETENTION BEGAN

The record shows that Lee was not given a citation as a result of her vehicle’s being found in an unauthorized location within the recreation area. As such, the event which frequently determines the point after which reasonable suspicion must be found is not present. See, e.g., *State v. Anderson*, *supra*; *State v. Gutierrez*, 9 Neb. App. 325, 611 N.W.2d 853 (2000); *State v. McGinnis*, 8 Neb. App. 1014, 608 N.W.2d 605 (2000). The record does establish, however, that shortly after Uher advised Mulbery that Lee “‘‘had prior drug arrests,’’” the officers requested permission to search the vehicle, which request was denied. Thereafter, Lee and

her vehicle were detained at the scene until the arrival of Uher and the drug dog. That such continued detention constituted a seizure for purposes of the Fourth Amendment is not contested by the State in its brief. The State acknowledges that “[f]ollowing the completion of the initial traffic stop and after consent to search had been denied, Sgt. Mulbery continued to detain Lee until such time as the drug dog arrived.” Brief for appellee at 9. Based on our de novo review of the record, we determine that Lee’s continued detention by the officers after consent to search was denied constituted a seizure for purposes of the Fourth Amendment. See *State v. Anderson*, *supra*.

We further determine it was at this point that the reasonable scope of the initial traffic stop ended. Once Lee denied permission to search, she had a right to proceed, unless during the period of lawful detention, Mulbery and Lytle developed a reasonable, articulable suspicion that Lee was involved in illegal activity beyond that which justified the interference in the first place. See, *State v. Anderson*, *supra*; *State v. McGinnis*, *supra*. See, also, *Terry v. Ohio*, *supra*.

3. REASONABLE, ARTICULABLE SUSPICION

[7-9] Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized suspicion or “hunch,” but less than the level of suspicion required for probable cause. *State v. Anderson*, 258 Neb. 627, 605 N.W.2d 124 (2000). Whether a police officer has a reasonable suspicion based on sufficient articulable facts requires taking into account the totality of the circumstances. *Id.* A finding of reasonable suspicion must be determined on a case-by-case basis. *State v. Mahlin*, 236 Neb. 818, 464 N.W.2d 312 (1991).

4. TOTALITY OF CIRCUMSTANCES

The State contends that the “totality of the circumstances” which justify a reasonable suspicion to continue Lee’s detention includes: (a) information previously received that the recreation area had been used for drug transactions, (b) Lee’s prior drug arrest history, (c) Lee’s extreme nervousness, (d) Lee’s divergent stories of whom she was meeting, and (e) Lee’s operation of her vehicle in a restricted area at an unusual time.

(a) Use of Recreational Area for Drug Transactions

The evidence pertaining to the use of this area for drug transactions comes from paragraph 8 of the affidavit in support of the search warrant, which was received into evidence at the suppression hearing. Paragraph 8 states: "The Saline County Sheriff's Office has received information prior to this incident that drug dealers and users are meeting at this location for drug transactions." This averment, the State contends, provides an appropriate circumstance for consideration in evaluating reasonable suspicion to detain. Lee's motion to suppress challenges the basis of such averment, contending that "[s]aid warrant contains information from unnamed sources whose reliability has not been demonstrated or otherwise appropriately qualified." The difficulty in evaluating the parties' respective arguments, however, is that one cannot tell from the district court's order whether it made a factual determination that the recreation area was being used for drug transactions and, if so, whether Mulbery and Lytle had knowledge of such information when they detained Lee.

While determinations of reasonable suspicion are made *de novo*, findings of historical fact to support reasonable suspicion are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial court. *State v. Kelley*, ante p. 563, 658 N.W.2d 279 (2003). Thus, while an appellate court will independently analyze the facts found by the trial court to determine if they amount to reasonable suspicion, it will nevertheless accept the trial court's factual findings unless they are clearly erroneous. *Id.*

We acknowledge that the averment in paragraph 8 of the affidavit in support of the search warrant may infer that Mulbery and Lytle were in possession of information that the recreation area in question had been used for drug transactions prior to Lee's continued detention. However, the evidence in this record amounts to little more than conclusory assertions by the State that drug transactions had occurred at the recreation area. Nothing in the record indicates where this information came from, why the source of the information was reliable, or whether the officers had the information when they detained Lee. Thus, even assuming that the trial court did find that the

recreation area was being used for drug transactions and that Mulbery and Lytle had knowledge of such information when they detained Lee, such finding was clearly erroneous. As a result, this evidence will not be considered in our reasonable suspicion analysis.

(b) Prior Drug Arrest History

The State further relies upon information obtained from the Saline County sheriff's office dispatcher and from the Crete Police Department regarding Lee's drug arrest history to support the conclusion that Mulbery and Lytle had reasonable suspicion to detain Lee. Testimony was presented at the motion to suppress hearing that Mulbery and Lytle were aware of Lee's drug arrest history when they detained her while awaiting the arrival of Uher and the drug dog. Mulbery testified that while Uher was en route to the recreation area with the drug dog, Uher informed Mulbery and Lytle that Lee "had prior drug arrests."

[10] An individual's criminal history may be a relevant factor when determining whether an officer has reasonable suspicion to detain an individual. *U.S. v. Sandoval*, 29 F.3d 537 (10th Cir. 1994) (cases collected). However, such history cannot form the sole basis to determine reasonable suspicion to support detention. *Id.* See, also, *People v. Ortiz*, 317 Ill. App. 3d 212, 738 N.E.2d 1011, 250 Ill. Dec. 542 (2000). We therefore conclude that Lee's prior drug arrest history is an appropriate factor for inclusion within the "totality of the circumstances" in our ultimate determination of reasonable suspicion.

(c) Lee's Nervousness

In further support of the district court's finding of reasonable suspicion, the State argues in its brief that "[w]hen Lee was contacted by the officers, she was found to be extremely nervous." Brief for appellee at 10.

In *State v. Anderson*, 258 Neb. 627, 605 N.W.2d 124 (2000), we discussed nervousness as a factor in evaluating reasonable suspicion. In *Anderson*, citing *U.S. v. Beck*, 140 F.3d 1129 (8th Cir. 1998), we observed that "nervousness, as a basis for reasonable suspicion, must be treated with caution." 258 Neb. at 638, 605 N.W.2d at 135. The reason nervousness is of limited value is the recognition that "[i]t is common knowledge that

most citizens . . . whether innocent or guilty, when confronted by a law enforcement officer who asks them potentially incriminating questions are likely to exhibit some signs of nervousness.’” *U.S. v. Hall*, 978 F.2d 616, 621 n.4 (10th Cir. 1992).

[11] Although nervousness is an appropriate factor for consideration within the “totality of the circumstances,” its presence is of limited significance generally. *U.S. v. McRae*, 81 F.3d 1528, 1534 n.4 (10th Cir. 1996) (stating that “nervousness alone is not sufficient to justify further detention; however, in combination with other suspicious circumstances, it might contribute to a finding of articulable suspicion”); *State v. Anderson*, *supra*. We will therefore include Lee’s nervousness as a factor within the “totality of the circumstances” in our ultimate determination of reasonable suspicion. However, such factor will be accorded minimal significance.

(d) Lee’s Divergent Stories

The State argues that the “divergent stories as to who[m] [Lee] was meeting and who her boyfriend was” is another appropriate factor for consideration within the “totality of the circumstances” supporting the trial court’s determination of reasonable suspicion. Brief for appellee at 13. Specifically, the State points to the testimony of Mulbery to the effect that Lee’s story “turned around” the second time Lee was asked her reasons for being in an unauthorized location in the recreation area. According to Mulbery, the first time Lee was asked why she was in the recreation area, her response was that she was there to meet her boyfriend, Talbott. The second time Lee was asked, however, she told Mulbery she was there to meet her boyfriend, “Johnson,” and that Talbott was in fact her brother.

[12] An individual’s inconsistent explanation of the reason for being at a particular location is a factor which may be considered within the “totality of the circumstances” in evaluating the existence of reasonable suspicion. See *U.S. v. Johnson*, 58 F.3d 356 (8th Cir. 1995) (indicating that inconsistent answers relating to purpose of trip may enable trooper to expand scope of stop). As such, we shall consider this circumstance in our ultimate determination of reasonable suspicion.

(e) Presence in Unauthorized Location
Within Recreation Area

As its final factor supporting Lee's continued detention, the State argues that Lee's operation of a vehicle in an unauthorized area at 9 p.m. in late November when no other activities were being conducted in the vicinity is an appropriate circumstance for consideration in a determination of reasonable suspicion.

[13] Lee's presence in the recreation area at 9 p.m. in late November in a location where vehicles were not authorized and when no other activities were being conducted in the vicinity does not amount to reasonable suspicion. However, it is a factor which can be considered in determining reasonable suspicion for continued detention. See *U.S. v. Dawdy*, 46 F.3d 1427 (8th Cir. 1995) (finding factors that may reasonably lead experienced officer to investigate to include time of day or night and location of suspect parties).

5. EVALUATION OF TOTALITY OF CIRCUMSTANCES

Based upon this record, the factors which we have concluded are appropriately within the "totality of the circumstances" for consideration in our de novo determination of reasonable suspicion are as follows: (1) Lee's drug arrest history, (2) Lee's nervousness, (3) Lee's divergent stories, and (4) Lee's presence in an unauthorized location within the recreation area at 9 p.m. in late November when no other activities were being conducted in the vicinity.

A determination of reasonable suspicion is based on the totality of the circumstances. *State v. Anderson*, 258 Neb. 627, 605 N.W.2d 124 (2000). The U.S. Supreme Court has concluded that even where each factor in a reasonable suspicion determination, considered independently, is consistent with innocent activities, those same factors may amount to reasonable suspicion when considered collectively. *United States v. Sokolow*, 490 U.S. 1, 109 S. Ct. 1581, 104 L. Ed. 2d 1 (1989). We evaluate those factors determined to be appropriate considerations in our totality of the circumstances analysis in such context.

When Lee was initially stopped, she was operating her vehicle in an unauthorized location within a recreation area at approximately 9 p.m. in late November when no other activities were

being conducted in the vicinity. This location, as described by Mulbery, was not “well lighted” and was “dark.” When the officers approached Lee, they found her to be “really nervous.” While conducting a check of Lee’s license and registration, the officers learned of her prior drug arrest history. Having gained this knowledge, the officers again approached Lee. When Lee was asked a second time why she was present in the recreation area, her story “turned around.” This time, Lee stated that she was there to meet a boyfriend whose last name was “Johnson” and that “Talbot” was, in fact, her brother. Upon our de novo review of the totality of the circumstances, we determine that these factors, when considered collectively, amount to reasonable, articulable suspicion to believe that “criminal activity was afoot.” See, *Reid v. Georgia*, 448 U.S. 438, 441, 100 S. Ct. 2752, 65 L. Ed. 2d 890 (1980) (citing *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)). Accord *State v. Anderson*, *supra*. Viewed collectively, they amount to something more than an inchoate and unparticularized suspicion or “‘hunch’” and support Lee’s continued detention. *Reid v. Georgia*, 448 U.S. at 441. See, also, *State v. Anderson*, *supra*; *State v. McCleery*, 251 Neb. 940, 560 N.W.2d 789 (1997) (officers allowed to draw specific reasonable inferences from facts in light of their experience).

[14] Having so determined, we need also consider whether the detention of Lee and her vehicle was reasonable in the context of an investigative stop. In doing so, we are guided by several considerations:

We consider both the length of the detention and the efforts of police to conduct their investigation quickly and unintrusively in determining whether a detention is reasonable in the context of an investigative stop: “[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer’s suspicion in a short period of time.”

U.S. v. Bloomfield, 40 F.3d 910, 916 (8th Cir. 1994) (quoting *U.S. v. Willis*, 967 F.2d 1220 (8th Cir. 1992)).

First, we consider the length of Lee’s detention. In *U.S. v. Hardy*, 855 F.2d 753 (11th Cir. 1988), the court determined that a

wait of 50 minutes for the arrival of a drug dog was not unreasonable for Fourth Amendment purposes. See, also, *U.S. v. White*, 42 F.3d 457 (8th Cir. 1994) (1-hour-20-minute wait for arrival of drug dog not unreasonable for Fourth Amendment purposes); *U.S. v. Bloomfield*, *supra* (1-hour wait for arrival of drug dog not unreasonable for Fourth Amendment purposes). The record indicates that just minutes after Lee was initially stopped, Uher was ordered to report to the recreation area with the drug dog, and further that Lee was detained for approximately 20 minutes. We determine that under the circumstances presented in this case, the length of Lee's detention was not unreasonable under the Fourth Amendment.

Second, we must consider whether the "investigative methods employed [were] the least intrusive means reasonably available to verify or dispel the officer's suspicion." See *U.S. v. Bloomfield*, 40 F.3d at 916. In this case, the officers chose to use a canine sniff to dispel their reasonable suspicion.

[A] canine sniff does not require the opening of luggage and does not reveal intimate but noncontraband items to public view. "[T]he manner in which information is obtained through this investigative technique is much less intrusive than a typical search." [*United States v. Place*, 462 U.S. 696, 707, 103 S. Ct. 2637, 77 L. Ed. 2d 110 (1983).] Nor does a canine sniff involve the time-consuming disassembly of luggage or an automobile frequently required in a thorough search for contraband.

U.S. v. Hardy, 855 F.2d at 759. Accord *State v. Chronister*, 3 Neb. App. 281, 526 N.W.2d 98 (1995). We agree that a canine sniff is minimally intrusive and was also not unreasonable for Fourth Amendment purposes.

Finally, we acknowledge that Mulbery called Uher, requesting the drug dog's presence, prior to Mulbery and Lytle's completion of their initial investigation. However, we find this irrelevant in our ultimate determination of reasonable suspicion. In our review of the record, it is clear that the drug dog did not arrive until after such time as the officers had reasonable suspicion to continue to detain Lee.

6. PROBABLE CAUSE FOR ISSUANCE OF WARRANT

Having determined that the officers had reasonable suspicion to continue Lee's detention, we further determine that the canine

sniff need not be excised from the affidavit in support of the search warrant. Therefore, the following averments in the affidavit upon which we must evaluate probable cause include, inter alia: (1) information that the area in question was known to be used for drug transactions, (2) Lee's drug arrest history, (3) Lee's divergent stories, (4) Lee's "driving in a restricted area . . . posted 'No Unauthorized Vehicles beyond this point,'" and (5) the drug dog's positive alert after performing a sniff of Lee's vehicle.

[15-18] In evaluating the validity of a search warrant, we consider familiar principles:

A search warrant, to be valid, must be supported by an affidavit which establishes probable cause. *State v. Johnson*[, 256 Neb. 133, 589 N.W.2d 108 (1999)]. "Probable cause" sufficient to justify issuance of a search warrant means a fair probability that contraband or evidence of a crime will be found. *State v. Craven*, 253 Neb. 601, 571 N.W.2d 612 (1997). Proof of probable cause justifying issuance of a search warrant generally must consist of facts so closely related to the time of issuance of the warrant as to justify a finding of probable cause at that time. *State v. Johnson, supra*. Probable cause to search is determined by a standard of objective reasonableness, that is, whether known facts and circumstances are sufficient to warrant a person of reasonable prudence in a belief that contraband or evidence of a crime will be found. *State v. Craven, supra*.

In reviewing the strength of an affidavit submitted as a basis for finding probable cause to issue a search warrant, an appellate court applies a "totality of the circumstances" rule whereby the question is whether, under the totality of the circumstances illustrated by the affidavit, the issuing magistrate had a substantial basis for finding that the affidavit established probable cause. *State v. Detweiler*, 249 Neb. 485, 544 N.W.2d 83 (1996). As a general rule, an appellate court is restricted to consideration of the information and circumstances found within the four corners of the affidavit. *State v. Johnson, supra*. . . .

When a search warrant is obtained on the strength of information received from an informant, the affidavit in

support of the issuance of the warrant must set forth facts demonstrating the basis of the informant's knowledge of criminal activity. The affidavit must also either establish the informant's credibility or set forth a police officer's independent investigation of the information supplied by the informant. [Citations omitted.] This is so because without information regarding the informant's credibility, "[t]he magistrate would have no way of ascertaining whether this tip was rumor, speculation, vendetta, reprisal, or gossip.'" *State v. Lytle*, 255 Neb. at 749, 587 N.W.2d 672, quoting with approval *State v. Valley*, 252 Mont. 489, 830 P.2d 1255 (1992). If an affidavit does not establish that an informant is reliable, a search warrant issued solely upon the information supplied by the informant is invalid. *State v. Lytle*, *supra*.

State v. Ortiz, 257 Neb. 784, 790-91, 805, 600 N.W.2d 805, 813-14, 822 (1999).

With respect to the information that the area was used for drug transactions, the record does not disclose the source of that information. We simply do not know whether the source was a citizen informant or an informant who has given reliable information in the past. See, *State v. Peters*, 261 Neb. 416, 622 N.W.2d 918 (2001); *State v. Grimes*, 246 Neb. 473, 519 N.W.2d 507 (1994), *overruled on other grounds*, *State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998). Furthermore, there is no evidence that establishes how long "prior to this incident" drug dealers were meeting at this location. We are left to speculate as to whether the averment in paragraph 8 occurred within a reasonable time so as not to be stale. See, *State v. Faber*, 264 Neb. 198, 647 N.W.2d 67 (2002); *State v. Groves*, 239 Neb. 660, 477 N.W.2d 789 (1991). Without any information as to the credibility of the source of this averment, the judge issuing this warrant would "have no way of ascertaining whether this tip was rumor, speculation, vendetta, reprisal, or gossip.'" See *State v. Lytle*, 255 Neb. 738, 749, 587 N.W.2d 665, 672 (1998), *disapproved on other grounds*, *State v. Johnson*, 256 Neb. 133, 589 N.W.2d 108 (1999). We therefore determine for the foregoing reasons that such averment is entitled to no weight in our ultimate determination of probable cause.

This, however, does not end the inquiry. As noted above, "if an affidavit does not establish that an informant is reliable, a search warrant issued solely upon the information supplied by the informant is invalid." *State v. Ortiz*, 257 Neb. at 805, 600 N.W.2d at 814. We are not presented with such a situation here. The affidavit in support of the search warrant contains information which is independent of the averment that the recreation area was being used for drug transactions. Thus, while such averment is entitled to no weight in our analysis, we will nevertheless assess the remainder of the affidavit, based on the totality of the circumstances, in concluding whether such affidavit provided probable cause to issue the search warrant for Lee's vehicle. See, *State v. Faber, supra*; *State v. Ortiz, supra*.

[19,20] When reviewing an issuing magistrate's decision with respect to the establishment of probable cause, we traditionally apply a standard of review which gives a magistrate's determination great deference. See *State v. Detweiler*, 249 Neb. 485, 544 N.W.2d 83 (1996) (citing *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983)). However, where the affidavit before the issuing magistrate contains information that an appellate court will not consider in a probable cause determination, the decision of the issuing magistrate is not entitled to such deference, but, rather, must be reviewed de novo. "'[A]s a matter of logic and common sense, a reviewing court cannot defer to a magistrate's consideration of an application for search warrant that the magistrate in effect did not review.'" See *Montana v. St. Marks*, 312 Mont. 468, 474, 59 P.3d 1113, 1117 (2002). See, also, 5 Wayne R. LaFare, *Search and Seizure, a Treatise on the Fourth Amendment* § 11.4 (3d ed. 1996). Here we do not give deference to the magistrate's decision, since we do not consider the averment that the recreation area was being used for drug transactions. Instead, we review the affidavit de novo. Although we conducted a de novo review in *State v. Ortiz*, 257 Neb. 784, 600 N.W.2d 805 (1999), to the extent that *Ortiz* could be read as giving deference to the issuing magistrate's probable cause determination after excision of averments from the search warrant affidavit, it is disapproved.

The remaining circumstances as set forth in the affidavit in support of the search warrant show that Lee had prior drug arrests,

was present on “November 30, 2000 at 2103 hours . . . in an area posted ‘No Unauthorized Vehicles beyond this point,’ ” and gave divergent explanations as to the reason for her presence at the recreation area. In addition, the canine sniff resulted in a positive alert for the presence of drugs. See, e.g., *U.S. v. Gregory*, 302 F.3d 805 (8th Cir. 2002) (positive alert by drug dog provides probable cause for search); *State v. Chronister*, 3 Neb. App. 281, 526 N.W.2d 98 (1995) (positive alert from drug dog constitutes probable cause for issuance of search warrant). See, also, *State v. Staten*, 238 Neb. 13, 469 N.W.2d 112 (1991) (positive alert by drug dog constitutes probable cause for arrest).

When these factors are considered collectively, we determine upon our de novo review, based upon a standard of objective reasonableness, that the totality of the above circumstances is sufficient “to warrant a person of reasonable prudence in the belief that contraband or evidence of a crime” would be found in Lee’s vehicle. See *State v. Craven*, 253 Neb. 601, 610, 571 N.W.2d 612, 619 (1997).

7. REMAINING ASSIGNMENTS OF ERROR

[21] Having concluded that the officers had reasonable suspicion to detain Lee following the conclusion of the initial traffic stop and further that probable cause existed for the issuance of a search warrant for her vehicle, it is unnecessary for us to consider whether the district court erred in its “alternative” finding that the search of Lee’s vehicle was justified as a search incident to arrest. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it. *State v. Burdette*, 259 Neb. 679, 611 N.W.2d 615 (2000). We also need not consider the State’s contention that Lee’s continued detention was supported by a de minimis exception to the Fourth Amendment. See *State v. Burdette*, *supra*.

VI. CONCLUSION

The officers who approached Lee for operating her vehicle in an unauthorized area had reasonable suspicion to continue to detain her after the initial traffic stop was complete. Thus, Lee’s continued detention was not an unreasonable seizure for Fourth Amendment purposes. As such, the relevant averments contained in the affidavit in support of the search warrant were sufficient for

its issuance, and the action of the district court in overruling Lee's motion to suppress was correct.

AFFIRMED.

HENDRY, C.J., dissenting.

I respectfully dissent. In my view, Sgt. Jeff Mulbery and Deputy Anthony Lytle did not have reasonable suspicion to continue Kandie A. Lee's detention after completing their initial investigation. As such, the positive canine sniff resulting from Lee's continued detention should be excised from the affidavit for search warrant. See *State v. Ortiz*, 257 Neb. 784, 600 N.W.2d 805 (1999). Considered without the averments regarding the canine sniff and the area's being known to be used for drug transactions, the affidavit for search warrant would not, in my opinion, establish probable cause to justify its issuance. Therefore, because the search warrant was invalidly issued, the resulting search was illegal and the fruit of that illegal search—the methamphetamine—should have been suppressed.

I concur with the majority's conclusion that insofar as the trial court made a factual finding that Mulbery and Lytle possessed information prior to Lee's continued detention that the recreation area in question had been used for drug transactions, such finding was clearly erroneous. I agree, therefore, that such factor should not be considered within the totality of the circumstances in evaluating whether the officers had reasonable suspicion to continue Lee's detention.

I disagree with the majority's determination, however, that the remaining four factors amount to reasonable suspicion. For the reasons discussed below, I believe the record demonstrates that each of the factors is of minimal significance in the ultimate determination of reasonable suspicion.

Lee's arrest record lacks a "temporal nexus" to the officers' suspicion that Lee was involved in drug activity. See *State v. Johnson*, 256 Neb. 133, 144, 589 N.W.2d 108, 116 (1999), *overruled on other grounds*, *State v. Davidson*, 260 Neb. 417, 618 N.W.2d 418 (2000) (concluding averment in affidavit regarding suspect's prior drug conviction was insufficient to establish probable cause due to absence of additional facts establishing temporal nexus to current investigation of suspect). See, also, *State v. Ortiz*, *supra*. Unless there is some temporal nexus between a

suspect's arrest record and the circumstances of the suspect's detention, such factor is of limited significance and, therefore, does not establish reasonable suspicion. *Id.* Since the State's evidence that "drug dealers and users are meeting at this location for drug transactions" cannot be considered within the totality of the circumstances, the required nexus is not present. See *State v. Johnson*, *supra*.

I agree with the majority's conclusion that Lee's nervousness is "of limited significance" since, as a general matter, most citizens become nervous when confronted by law enforcement officers. However, I believe the significance of Lee's nervousness is even further diminished by the fact that the record with respect to Lee's nervousness would appear to consist primarily of the four following words: "she was really nervous." Nowhere in the record can there be found a description of Lee's conduct from which Mulbery concluded Lee was "really nervous." We do not know, *inter alia*, whether Lee was shaking or had difficulty locating her registration, see *State v. Anderson*, 258 Neb. 627, 605 N.W.2d 124 (2000), or failed to make eye contact, see *U.S. v. Beck*, 140 F.3d 1129 (8th Cir. 1998). In my view, the absence of any particularized description of Lee's nervousness or an explanation as to why Lee's nervousness was suspicious prevents the court from accurately assessing whether such factor reasonably led the officers to suspect Lee was involved in drug activity.

With respect to Lee's "divergent stories," it is clear from the record that any divergence was, at the very most, minor. At the suppression hearing, Mulbery testified:

Q. What was, what did she say that led to your conclusion that her story was misleading or false?

A. Well, she first said she was out to meet her boyfriend Stacy Talbott. And then she turned around and said that her brother, Stacy Talbott is her brother. And then said that her boyfriend was with Stacy Talbott with the last name of Johnson.

Q. Isn't it entirely possible that what she was saying was that she was there to see her boyfriend and Stacy Talbott?

... .

A. Could have been.

Moreover, given Lee's nervousness, there was an equally innocent explanation for the inconsistency.

With respect to Lee's presence in the unauthorized location within the recreation area at 9 p.m. in late November, I find little indication in the record that such factor was objectively suspicious or indicative of drug activity. Although Lee's vehicle was in an unauthorized area, the record demonstrates that it was only the presence of Lee's vehicle that was unauthorized. At all relevant times, the recreation area was open to the public. Had Lee parked her vehicle in an authorized area and walked to the location in question, there would have been no violation and no reason for the officers to stop her. Additionally, since the evidence relating to this area's being used for "drug transactions" cannot be considered, any link between Lee's presence in the recreation area and drug activity is further attenuated.

The majority determines that when all four of the above factors are considered collectively, they amount to reasonable suspicion. I disagree. Missing is any nexus between Lee's presence and drug activity. I find no adequate explanation in the record as to why such seemingly innocent factors, considered collectively, led the officers to suspect that Lee was involved in drug activity. To the contrary, I believe the record demonstrates the officers simply acted out of an inchoate hunch rather than suspicion based on articulable facts. I believe this conclusion is inescapable given that (1) the officers radioed for the drug dog *before* learning of Lee's drug arrest history and (2) there is no evidence in the record from which to conclude the officers knew that drug activity had occurred previously in the recreation area.

Therefore, I believe there is insufficient evidence in this record from which to conclude that the officers' suspicion was reasonable under the circumstances. The court is left to simply adopt the State's characterization of the officers' conduct. I do not believe this is permissible, since

[i]t is for the courts to determine when an officer's conduct squares with the Fourth Amendment, giving "due weight," as the Court put it in *Terry* [*v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)], "to the specific reasonable inferences which he is entitled to draw from the facts *in light of his experience*." And, it is for the police to

articulate the facts and what their experience reveals as to those facts. Such generalities as “he didn’t look right” will not suffice; . . . the officer must relate what he has observed, and, when appropriate, indicate why his knowledge of the crime problem and the habits of the residents on his beat or of the practices of those planning or engaging in certain forms of criminal conduct gives special significance to what he observed.

(Emphasis in original.) 4 Wayne R. LaFave, *Search and Seizure, a Treatise on the Fourth Amendment* § 9.4(a) at 141-42 (3d ed. 1996).

In view of the record, the four factors relied upon by the majority are not, in my opinion, inherently or objectively indicative of drug activity. Moreover, any inferences of drug activity the officers were permitted to draw from such factors are simply not adequately set forth or thoroughly explained. Based upon this record, I am unable to conclude that the officers’ suspicion that Lee was involved in drug activity was reasonable. I would reverse.

STEPHAN, J., joins in this dissent.

JASON SCOTT WALLS, APPELLANT, V.

JAMES SHRECK, M.D., APPELLEE.

658 N.W.2d 686

Filed April 4, 2003. No. S-02-149.

1. **Directed Verdict: Appeal and Error.** In reviewing a trial court’s ruling on a motion for directed verdict, an appellate court must treat the motion as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence.
2. **Directed Verdict.** A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom.
3. **Malpractice: Physicians and Surgeons: Expert Witnesses.** A physician’s duty to obtain informed consent is measured by the standard of a reasonable medical practitioner under the same or similar circumstances and must be determined by expert medical testimony establishing the prevailing standard and the defendant-practitioner’s departure therefrom.

4. **Malpractice: Physicians and Surgeons: Expert Witnesses: Proof.** Ordinarily, in a medical malpractice case, the plaintiff must prove the physician's negligence by expert testimony.
5. **Malpractice: Physicians and Surgeons: Expert Witnesses: Presumptions.** One of the exceptions to the requirement of expert testimony in a medical malpractice case is the situation where the evidence and the circumstances are such that the recognition of the alleged negligence may be presumed to be within the comprehension of laypersons.

Appeal from the District Court for Lincoln County: DONALD E. ROWLANDS II, Judge. Reversed and remanded for further proceedings.

J. Blake Edwards and Robert Harvoy, of McGinley, O'Donnell, Reynolds & Edwards, P.C., L.L.O., for appellant.

William R. Settles, of Lamson, Dugan & Murray, L.L.P., for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, McCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

NATURE OF CASE

Jason Scott Walls appeals from a directed verdict in favor of James Shreck, M.D. In his operative petition, Walls alleged that Shreck performed surgery on Walls' right eye without obtaining informed consent.

SCOPE OF REVIEW

[1] In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat the motion as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence. *Reicheneker v. Reicheneker*, 264 Neb. 682, 651 N.W.2d 224 (2002).

FACTS

As a child, Walls had a condition that caused his left eye to be out of alignment with his right eye. He had surgery on his left

eye to correct the condition, but it reoccurred several years later. In March 1999, Walls sought medical treatment from Shreck in North Platte. Shreck is a physician and surgeon licensed under the laws of the State of Nebraska and is a health care provider under the Nebraska Hospital-Medical Liability Act.

Walls met with Shreck and discussed the possibility of strabismus surgery on his left eye to correct the condition. This surgery involves a procedure on the affected eye or on the opposite eye, and the object of the surgery is to bring both eyes into alignment. Walls and Shreck agreed that the best approach to treating Walls was to attempt surgery on the left eye. Shreck testified he told Walls that although the goal was to operate on the left eye, he might have to operate on the right eye instead. Walls testified that he specifically informed Shreck that he did not want surgery performed on his right eye. Shreck admitted that he did not discuss operating on both eyes at the same time.

Prior to surgery, Walls signed an authorization and consent form that included the following language:

a. I hereby authorize Dr. Shreck . . . to perform the following procedure and/or alternative procedure necessary to treat my condition: . . . Recession [sic] and Resection of the Left Eye[.]

b. I understand the reason for the procedure is: to straighten [sic] my left eye to keep it from going to the left[.]

. . . .

d. It has been explained to me that conditions may arise during this procedure whereby a different procedure or an additional procedure may need to be performed and I authorize my physician and his assistants to do what they feel is needed and necessary.

During surgery on April 13, 1999, Shreck encountered excessive scar tissue on the muscles of Walls' left eye and elected to adjust the muscles of the right eye instead.

When Walls awoke from the anesthesia, he expressed surprise and anger at the fact that both of his eyes were bandaged. The next day, Walls went to Shreck's office for a followup visit and adjustment of his sutures. Walls questioned Shreck as to the reason he operated on Walls' right eye, and Shreck responded that he had reserved the right to change his mind during surgery.

Walls testified that he would never have entered the hospital if he had known there was a possibility of surgery on his right eye, because he had so many problems with his left eye after the childhood surgery. He said that prior to surgery, he had no problems with his right eye. He also testified that following the April 1999 surgery, he has had daily problems with his right eye.

At trial, Dr. Thomas Roussel provided expert medical testimony on behalf of Walls. Roussel was the only expert witness to testify regarding the standard of care for obtaining informed consent prior to strabismus surgery.

After Walls presented his evidence and rested his case, Shreck moved for a directed verdict and a dismissal. He alleged that Walls had failed to prove a prima facie case. Shreck claimed that there had been no expert testimony that he had failed to obtain Walls' informed consent for the procedure. The trial court concluded that Walls had failed to establish the standard of care required in this situation or that Shreck had violated the standard of care. It sustained Shreck's motion for directed verdict and dismissed the action. Walls timely appealed.

ASSIGNMENTS OF ERROR

Walls assigns the following errors: The trial court erred (1) as a matter of law in granting Shreck's motion for directed verdict and (2) in viewing the testimony presented by Walls in a light that was not most favorable to him when considering the motion for directed verdict.

ANALYSIS

[2] In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat the motion as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence. *Reicheneker v. Reicheneker*, 264 Neb. 682, 651 N.W.2d 224 (2002). A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom. *Jay v. Moog Automotive*, 264 Neb. 875, 652 N.W.2d 872 (2002).

In sustaining Shreck's motion for directed verdict, the trial court noted that Walls bore the burden to establish the standard of care by expert testimony. It concluded that Walls failed to meet this burden. The court stated:

[Y]our position is that you did not consent to surgery on your right eye, but based upon the consent form which you signed . . . and the testimony specifically of Dr. Roussel . . . there can be extenuating circumstances when the surgeon exceeds the scope of what was discussed pre-surgery with the patient — and I didn't get the impression from Dr. Roussel that he was talking about an emergency situation.

I got the impression that he was talking about surgeries in general. And that's exactly what Dr. Shreck has said; that he started working on your left eye and determined that because of either prior surgery or scarring, that he could not make the necessary corrections in his opinion, and that's why he went to the right eye to try to solve the problem.

. . . I don't feel that there has been any expert evidence that Dr. Shreck violated the standard of care with reference to an informed consent situation here.

A physician's duty to obtain informed consent is measured by the standard of a reasonable medical practitioner under the same or similar circumstances and must be determined by expert medical testimony establishing the prevailing standard and the defendant-practitioner's departure therefrom. *Robinson v. Bleicher*, 251 Neb. 752, 559 N.W.2d 473 (1997).

We review the evidence to determine whether Walls has established by expert testimony (1) the standard of care in North Platte and similar communities for obtaining informed consent prior to performing surgery and (2) whether there was sufficient evidence to establish that Shreck violated such standard of care. We are required to give Walls the benefit of every inference that can reasonably be deduced from the evidence. See *Reicheneker v. Reicheneker*, *supra*.

STANDARD OF CARE

The Legislature has defined informed consent as follows:

Informed consent shall mean consent to a procedure based on information which would ordinarily be provided to

the patient under like circumstances by health care providers engaged in a similar practice in the locality or in similar localities. Failure to obtain informed consent shall include failure to obtain any express or implied consent for any operation, treatment, or procedure in a case in which a reasonably prudent health care provider in the community or similar communities would have obtained an express or implied consent for such operation, treatment, or procedure under similar circumstances.

See Neb. Rev. Stat. § 44-2816 (Reissue 1998).

Under § 44-2816, there are two parts to the definition of informed consent. The first part refers to the information that is provided to the patient regarding the procedure that is to be performed. Depending on the established standard of care, the information might include a description of what is going to be done, an assessment of the risks involved, and other options that might be considered. The second part refers to the obligation of the health care provider to obtain the patient's express or implied consent to perform any operation, treatment, or procedure.

Roussel, an ophthalmologist from Scottsbluff, testified on behalf of Walls. Roussel stated that it was customary to discuss with patients the potential risks of a surgery, the potential benefits, and the alternatives to surgery. Roussel opined that the standard of care for obtaining informed consent required a physician to discuss with his or her patients on which part of the body surgery would be performed. Roussel stated that he thought the standard for performing a strabismus surgery would be the same as for any type of operation. When asked whether that standard was centralized to Scottsbluff or North Platte, Roussel testified that "in our country[,] medical ethics requires informed consent." Roussel also stated that the standard of care for surgery involving nonemergency procedures requires informed consent.

Roussel was then asked a hypothetical question: "[I]f surgery . . . to a body part of a patient is not discussed with that patient and surgery is then performed, does that violate the standard for informed consent?" The trial court instructed Roussel to express his opinion if it was based on a reasonable degree of medical certainty in his field of ophthalmology. Roussel responded: "Well, my feeling is that if there are extenuating circumstances, that can

cause a surgeon to, you know, make a judgment that is in the best interests of the patient to do what he feels at the time is necessary." Walls' attorney asked: "Are you saying that talking to the patient is required about the surgery or not required?" Roussel responded: "Well, you normally discuss as many contingencies as you can think of ahead of time." Roussel was not asked to define extenuating circumstances, and he was not asked any further questions on this topic.

Giving Walls the benefit of every inference which can reasonably be deduced from the evidence, we conclude that Roussel's testimony established that the standard of care in North Platte and similar communities required Shreck to obtain informed consent before performing strabismus surgery on Walls' right eye. To obtain Walls' informed consent, Shreck was not only required to provide certain information regarding the operation, but he was also required to obtain Walls' express or implied consent for the operation. See § 44-2816. Walls presented sufficient evidence by expert testimony to establish the standard of care in this case.

ALLEGED BREACH

We next examine whether Walls presented sufficient evidence to establish that Shreck violated the standard of care by operating on Walls' right eye without obtaining informed consent. The trial court concluded that Walls had failed to prove that Shreck had violated the standard of care.

Shreck argues that he obtained informed consent:

Walls may argue that Dr. Shreck testified that this consent form did not give "permission to do surgery on both eyes." . . . However, this misconstrues Dr. Shreck's testimony. Dr. Shreck opined that he had obtained the patient's informed consent not from the form but from "what we discussed with the patient in the office." . . . The form itself does not operate to give or deny permission for anything. Rather, it is *evidence* of the discussions which occurred and during which informed consent was obtained. *See, e.g., Hondroulis v. S[c]huhmacher*, 553 So.2d 398 (La. 1988).

Brief for appellee at 12. Shreck therefore asserts that he obtained informed consent to operate on both eyes based on his office discussions with Walls.

[3] In *Robinson v. Bleicher*, 251 Neb. 752, 559 N.W.2d 473 (1997), we held that a physician's duty to obtain informed consent is measured by the standard of a reasonable medical practitioner under the same or similar circumstances and must be determined by expert medical testimony establishing the prevailing standard and the defendant-practitioner's departure therefrom. In deciding whether a patient was properly informed concerning an operation, expert testimony would be required to determine whether the information furnished to the patient was that which would ordinarily be provided to a patient under like circumstances. See *id.* However, whether expressed or implied consent to an operation was obtained does not necessarily require expert testimony. The performance of surgery upon part of a patient's anatomy that the patient has instructed the surgeon not to operate falls within an exception to the requirement of expert testimony on the issue of informed consent.

[4,5] Ordinarily, in a medical malpractice case, the plaintiff must prove the physician's negligence by expert testimony. *Fossett v. Board of Regents*, 258 Neb. 703, 605 N.W.2d 465 (2000). In *Fossett*, we recognized an exception to the rule that expert testimony is required to prove whether the treatment by a physician or a surgeon demonstrated a lack of skill or knowledge or a failure to exercise reasonable care, citing *Halligan v. Cotton*, 193 Neb. 331, 227 N.W.2d 10 (1975). In *Halligan*, we stated: "One of the exceptions to the requirement of expert testimony is the situation where the evidence and the circumstances are such that the recognition of the alleged negligence may be presumed to be within the comprehension of laymen." 193 Neb. at 335-36, 227 N.W.2d at 13. This exception is referred to as the "common knowledge exception."

Generally, this exception is applicable in cases where the physician fails to remove a foreign object from a patient's body or where a patient enters the hospital for treatment of one part of the body and sustains injury to another part of the body. See, *Boyd v. Chakraborty*, 250 Neb. 575, 550 N.W.2d 44 (1996); *Swierczek v. Lynch*, 237 Neb. 469, 466 N.W.2d 512 (1991). In *Swierczek*, we stated that it is "within the common knowledge and experience of a layperson to determine that an individual does not enter the hospital for extraction of her teeth and come out with an injury to

nerves in her arms and hands, without some type of negligence occurring.” 237 Neb. at 478, 466 N.W.2d at 518.

Shreck obtained Walls’ informed consent to perform surgery on his left eye. However, the issue of whether Shreck obtained Walls’ informed consent to perform surgery on the right eye is problematic. Failure to obtain informed consent includes failure to obtain express or implied consent for any operation in which a reasonably prudent health care provider would have obtained such consent. See § 44-2816. Thus, the lack of express or implied consent to operate on a particular part of one’s anatomy or a refusal to give express or implied consent to so operate is a failure to obtain informed consent. Roussel opined that medical ethics requires informed consent.

The evidence shows that Shreck did not discuss with Walls that surgery might be required on both eyes during the same operation. There is evidence that Walls specifically told Shreck he did not want surgery performed on the right eye. Walls stated that he would never have entered the hospital had he known there was a possibility of surgery on his right eye.

Shreck stated that he was unable to complete the strabismus surgery on Walls’ left eye and therefore switched his focus to the right eye and performed the surgery on that eye. When questioned as to the reason for operating on the right eye, Shreck stated that he had reserved the right to change his mind. However, he also stated to Walls’ father that he should have done a better job of informing Walls as to the possibility of surgery on the right eye. This evidence creates an inference that Shreck did not obtain informed consent to operate on the right eye.

Giving Walls the benefit of every inference which can reasonably be deduced from the evidence, we conclude that the facts are not such that reasonable minds can draw but one conclusion with regard to whether Shreck obtained informed consent to perform surgery on Walls’ right eye. There is evidence that Walls specifically told Shreck he did not want surgery performed on the right eye. Evidence of the discussions which occurred between Walls and Shreck do not establish as a matter of law that Shreck obtained informed consent to perform surgery on both eyes or that he obtained such consent to operate on the right eye.

Expert testimony was not required to establish that Walls did not give express or implied consent for Shreck to operate on his right eye. If Shreck operated on the right eye without Walls' express or implied consent, then the common knowledge exception is applicable in establishing whether Shreck met the standard of care regarding informed consent to perform the surgery. Therefore, it would not be necessary to establish by expert testimony that Shreck violated the standard of care by operating on Walls' right eye. Absent an emergency, it is common knowledge that a reasonably prudent health care provider would not operate on part of a patient's body if the patient told the health care provider not to do so.

CONCLUSION

The trial court erred in directing a verdict in favor of Shreck. The evidence presented and the reasonable inferences therefrom establish that the standard of care in North Platte and similar communities requires health care providers to obtain informed consent before performing surgery on a particular part of a patient's anatomy. The requirement for obtaining a patient's informed consent includes the duty to obtain his or her express or implied consent to the surgery. In this case, the applicable standard of care required Shreck to obtain Walls' express or implied consent to perform surgery on his right eye. Walls claims he refused to give such consent. The facts are not such that reasonable minds can draw but one conclusion as to whether Shreck deviated from the standard of care in North Platte when he operated on Walls' right eye.

For the reasons set forth herein, the judgment of the trial court is reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED FOR
FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V.
ALONZO NEAL, APPELLANT.
658 N.W.2d 694

Filed April 4, 2003. No. S-02-239.

1. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility.
2. **Rules of Evidence: Appeal and Error.** When judicial discretion is not a factor in assessing admissibility, the court's application of the Nebraska Evidence Rules will be upheld unless clearly erroneous.
3. **Rules of Evidence: Hearsay.** A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is consistent with his or her testimony and is offered to rebut an express or implied charge against him or her of recent fabrication or improper influence or motive.
4. ____: ____: Neb. Rev. Stat. § 27-801(4)(a)(ii) (Reissue 1995) permits the introduction of a declarant's consistent out-of-court statements to rebut a charge of recent fabrication or improper influence or motive only when those statements were made before the charged recent fabrication or improper influence or motive.
5. **Criminal Law: Trial: Juries: Evidence: Appeal and Error.** In a jury trial of a criminal case, an erroneous evidentiary ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt.
6. **Verdicts: Juries: Appeal and Error.** Harmless error review looks to the basis on which the jury actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.

Appeal from the District Court for Douglas County: PETER C. BATAILLON, Judge. Reversed and remanded for a new trial.

W. Patrick Dunn for appellant.

Don Stenberg, Attorney General, and Mark D. Raffety for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, McCORMACK, and MILLER-LEMAN, JJ.

HENDRY, C.J.

INTRODUCTION

Alonzo Neal was convicted of first degree murder and use of a deadly weapon in the commission of a felony in the death of Garry Morris. The Douglas County District Court sentenced Neal

to a period of life imprisonment on the first degree murder conviction and a term of 20 years' imprisonment on the use of a deadly weapon conviction. The two sentences were to be served consecutively. The latter sentence was enhanced pursuant to the district court's determination that Neal was a habitual criminal.

FACTUAL BACKGROUND

At approximately 12:10 a.m. on Monday, January 15, 2001, Officer Larry Bakker of the Omaha Police Department was on routine patrol when he was flagged down by an individual, later identified as Martin Carroll. Carroll informed Bakker that he had just discovered his roommate, Morris, lying in a pool of blood at their apartment. During the subsequent investigation, the Omaha Police Department determined from Carroll that some of Morris' personal property was missing, including Morris' vehicle, a green Ford Focus.

A radio broadcast was put out on the car, which was located and stopped. The driver of the car was identified as Joseph Keyes. Keyes informed the officers who had stopped him that he had received the vehicle from a friend around midnight. There was testimony at trial indicating that the remainder of Morris' personal property was either purchased by Katherinea Hytche and Adrian Page, acquaintances of Neal's, or traded by Neal for drugs. Neal was subsequently arrested, charged, and convicted of first degree murder and use of a deadly weapon to commit a felony.

Dr. Blaine Roffman testified as to his examination and autopsy of Morris. Roffman's external examination noted that Morris had "six deep irregular shaped lacerations that penetrated down to the skull" on the left side of his scalp, and there was some bruising of the skin and abrasions on Morris' left arm. An internal examination of Morris' skull showed two skull fractures, one above the right ear and the other in the midportion of the back of the skull.

Roffman identified the cause of the fractures as blunt trauma, stating that "[i]t would take excessive, significant force to produce a fracture of a skull to this degree. Particularly a depressed skull fracture, to go through the thickness of the skull in those areas and produce those type[s] of fractures would take a great deal of force." Roffman testified that Morris had sustained

between six and eight blows to the head. Roffman further testified that the cause of Morris' death was the two skull fractures in association with the six major lacerations. According to Roffman, these injuries occurred from blunt trauma resulting in brain hemorrhage. Roffman also testified that the wounds indicated Morris was struck from behind, but that if Morris was lower than the attacker and the attacker was standing in front of Morris, it would be possible for the blows to have been struck from above Morris. Finally, Roffman testified that he could not estimate a time of death or which blow Morris received first, but that it was likely that the blows Morris received would have rendered him unconscious.

Several individuals who were involved in the processing of evidence from the crime scene testified. Their testimony disclosed that Neal's fingerprints were found on the toilet tank at the scene and on one of the lamps that was missing from the apartment. There was also testimony indicating that a blood sample from the front door of the apartment, as well as a sample from the floor of the bathroom, matched Neal's blood type.

Neal also testified. On direct examination, Neal described his relationship with Morris prior to Morris' death. He then testified to his version of the events surrounding Morris' death on the evening of Saturday, January 13, 2001. Neal stated that he had called Morris because Morris had offered to make Neal supper. Morris picked Neal up at Neal's sister's home, and together they rented three movies and stopped at a store to purchase food. Neal testified that after they had run those errands, they went to Morris' apartment. While Morris began to make supper, Neal sat down on a chair in Morris' living room and began to watch a movie. According to Neal, Morris also gave Neal a hammer and nail and asked Neal to hang a wall hanging. At some point, Morris came into the living room and lay down on the floor to watch the movie. They later ate supper while continuing to watch the movie. Neal then testified as follows:

[Neal's counsel:] Still drinking?

[Neal:] Well, I'm drunk now really. I done — I done dozed off basically. I dozed off.

Q. While the movie was still on?

A. Yeah.

Q. What's the next thing you remember?

A. I guess I tried to move, I don't know. But I woke up and this dude had my — my — my penis in his hand.

Q. Let me ask you this: Describe when you woke up the position of his body.

[Neal]: Could I show?

[Court]: (The [judge] nods head in the affirmative.)

[Neal]: Like this. I'm like this in the — in the — in the chair (indicating).

Q. . . . All right.

A. Then he's just like — like this on — like this on me. He was more or less up here like this on me (indicating).

Q. What happened at that point? Did you look at him?

A. No I didn't. Well, yeah, I noticed that, and I just —

Q. What else did you notice?

A. My penis in his hand.

Q. Okay.

A. And I hit him. You know, I hit him, hit him (indicating). When I got up, I stood up this way (indicating).

[Neal]: Is it cool?

[Court]: (The [judge] nods head in the affirmative.)

[Neal]: I stood up this way (indicating), and I pushed up off the table, and whatever I grabbed I started swinging with it.

Neal testified that he continued hitting Morris until something hit him in the face. He then noticed that his hand was bleeding, so he ran to the bathroom where he set the hammer down on the bathroom sink to look for a bandage to stop the blood. Unable to find a bandage, he wrapped a towel around his hand and went into the kitchen to continue his search. He opened a drawer and found a car key, which he took. He then ran out of the apartment, getting about halfway down the stairs before realizing how cold it was and that he did not have his coat or shoes. He returned to the apartment, but the door was locked. Neal stated that he then went to Morris' car to look for a spare apartment key. Finding none, he testified that he used a hook from a wall shelf he found in the trunk of Morris' car to open the locked apartment door. After reentering the apartment, Neal grabbed not only his coat and shoes, but Morris' stereo. Neal then testified that he put the

stereo in the trunk of Morris' car and went back up to the still-open apartment and took Morris' television. Neal also testified that at some point, he took a cellular telephone from Morris' back pocket.

Neal then testified that after he left the scene, driving Morris' car, he exchanged the stereo and television for drugs, which he then smoked at a friend's house. Later that night, remembering he had left the hammer in Morris' bathroom, Neal returned to the scene to retrieve it. Again using the hook to gain entrance, Neal reentered Morris' apartment and grabbed the hammer, which he threw in the sewer. He also stole more of Morris' property, which he then sold to Hytche and Page. The following exchange then took place:

[Neal's counsel:] Do you know, other than the ladies and gentlemen of this jury and myself, is there anyone that you've told what happened inside Garry Morris's apartment?

[Neal:] Yeah, three people.

Q. Who?

A. LaShawn Grant, Neshee (phonetic), I don't know her last name, and a friend of mine, he's dead now, his name is Derrick Brown.

Q. Let's talk about LaShawn Grant and Neshee. When did you talk to them?

A. Well, uh, I think that was Monday. It might have been Tuesday when they showed my face on TV about the car.

Q. What happened?

A. Well, Joseph Keyes, I let him get the car. He wanted to use it for a few, and but I wanted — told him to give it to me at a certain time and he never brought it back to me, and he got caught with the car.

Q. And so sometime after Sunday you talked to Neshee and LaShawn?

A. Yeah.

Q. How did that come about?

A. I was, uh — I'm on the run, really, you know, and I seen — I stopped her and told her I needed a ride. And, uh, she was: What happened, Alonzo, you know, what's going on? She cryin'. And I told her what happened.

Q. What did you tell her?

[State]: Objection; it's hearsay.

[Neal's counsel]: I asked what he told her.

[Court]: What he told her?

[State]: It's hearsay.

[Court]: Overruled. Unless you want to have a sidebar.

[Neal's counsel]: I'll withdraw the question, Judge.

[Court]: Okay.

The record indicates that Neal, Dineshee Thornton, and LaShawn Grant had this conversation on either Monday, January 15, or Tuesday, January 16, 2001. The record further reflects that Neal was arrested on January 23.

On cross-examination, Neal testified:

[State:] So when you wake up, he's holding onto your penis and he's hovering over your penis; is that what you're trying to say?

[Neal:] Yeah, I don't know if he done — if he put it in his mouth already or nothin'. I just noticed this man got my penis in his hand.

....

Q. So you wake up when this is going on, and what's the first thing that you do?

A. I punch him in the face.

Q. All right. With what?

A. My right hand.

Q. And do you know where you hit him in the face?

A. No, I just swung like that (indicating) and at the same time pushing him. And I got up, I leaned to get up, you know, 'cause my foot was on — both my feet was on the stool, and I leaned to get up (indicating).

Q. All right. Did he fall after you hit him in the face?

A. Yeah, he went down like, but he came back up 'cause he outstretched his arm at me.

Q. How many times did you hit him in the face?

A. Just that once when I pushed him up off me that I remember.

....

Q. But you hit him in the face, and then he stands up and puts his hand out at you. What happened then?

A. He didn't stand. He was on his knees like, and when I got him up off me he was like on his knees or something. He was falling like, you know, leaning and he did like this (indicating).

Q. All right. And what did you do?

A. I got up. I'm getting up like this, and I moved around. Like he's facing this way and I'm above him like that (indicating), and —

Q. So you're standing above him?

A. And when I got up, I got up off the table. Like the chair was closer to the table. So when I stepped off of this side of the chair, I first used the table to get up, and I had the hammer in my hand, and —

Q. Go ahead.

A. — and then he — he right here, basically, when I stand up, and I swing and I swing.

Continuing its cross-examination, the State asked Neal:

Q. And once you were arrested in this case, at some point in time you became aware of all of the information through the police reports, the DNA reports, the reports regarding the fingerprints, as to what sort of evidence the police had against you in this case; isn't that right?

A. Well, they said they had fingerprints of mine at the house.

Q. Well, you're aware through the process of discovery and preliminary hearings of what the evidence was in this case; isn't that right?

A. Well, no. That night I got caught I was informed that they . . . had my fingerprints, was the ones that they found at the house.

Following Neal's testimony and after learning of Neal's plans to call Thornton and Grant to testify, the State filed a motion in limine seeking to exclude such evidence. In opposing the State's motion, Neal argued that Thornton and Grant should be permitted to testify pursuant to Neb. Rev. Stat. § 27-801(4)(a)(ii) (Reissue 1995). It was Neal's contention that this testimony was proper to rebut the State's implication that his version of events was fabricated to comport with the forensic evidence found at the scene. After a hearing, the district court, relying upon *State v. Morris*,

251 Neb. 23, 554 N.W.2d 627 (1996), and *State v. Anderson*, 1 Neb. App. 914, 511 N.W.2d 174 (1993), sustained the motion.

An offer of proof was then made, in which both Thornton and Grant testified that shortly after Morris was killed, Thornton and Grant gave Neal a ride. When Grant asked questions relating to Neal's being "on the news," Neal reportedly told both of them that "it didn't happen like that." According to Thornton and Grant, Neal told them he was at Morris' apartment and that when he woke up, Morris was "sucking on his penis so he grabbed something and hit him with it."

During closing arguments, the State pointed out, with regard to Neal's knowledge of the evidence against him:

The defense says, well, we [the State] don't contest everything else that he says. Well, no, that's not true. We contest everything that he says. We know that Alonzo Neal was there that night because the physical and the forensic evidence support that. I don't know about anything else that he says. *There's nothing to corroborate any of that testimony.*

. . . [W]hen we talked about the DNA evidence and the fingerprint evidence, when [Neal was] arrested on January 23rd the police interviewed him. All right? He doesn't know that there's DNA evidence that shows that his blood is in that apartment. He doesn't know at that time that his fingerprints are going to be discovered. And his version of events at that time when he's interviewed by the police as to what's taken place is: I don't know anybody by the name of Garry Morris and Porky [Joseph Keyes] was driving some kind of green car and I saw it that night.

So think about that when he's talking about the credibility of the defendant. So at that point in time it's, well, I don't know what they know. Okay. And I can always say, hey, Porky gave me the stuff from the apartment. Well, Porky gave me the stolen car, or Porky had the car, whatever. Okay. And maybe that's where I'm going to try and work the angle on this thing. But that's his — that's his statement to the police on January 23rd before he knows what the police have got as far as the evidence in this case, before he knows that his blood has been found at that apartment, before he

knows that his fingerprints have been found on these lamps, the lamps and the bathroom on the tank. That's his version. And is that something that is very important when you judge his credibility as a witness? Certainly.

The judge will instruct you about that, any prior inconsistencies that he would have along with a motive not to tell you the truth along with the factor of him having five felony convictions is a factor to consider with regard to his credibility. Very important factors. Because Alonzo Neal has a problem, here, okay?

(Emphasis supplied.)

The jury found Neal guilty of first degree murder and use of a deadly weapon to commit a felony. Neal's motion for a new trial was overruled. This appeal followed.

ASSIGNMENTS OF ERROR

Neal assigns, rephrased, that the district court erred by (1) refusing to allow him to adduce evidence of his prior consistent out-of-court statement to rebut an express or implied charge of recent fabrication or improper influence or motive, (2) violating due process by refusing to allow him to adduce evidence of his prior consistent out of court statement, and (3) overruling his motion for a new trial.

STANDARD OF REVIEW

[1,2] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. *State v. Haltom*, 264 Neb. 976, 653 N.W.2d 232 (2002). When judicial discretion is not a factor in assessing admissibility, the court's application of the Nebraska Evidence Rules will be upheld unless clearly erroneous. *State v. Rieger*, 260 Neb. 519, 618 N.W.2d 619 (2000).

ANALYSIS

APPLICABILITY OF § 27-801(4)(a)(ii)

[3,4] In his first assignment of error, Neal argues that he should have been permitted to call Thornton and Grant to testify concerning statements Neal made to them prior to his arrest

and questioning by the police. He argues that the statements made to Thornton and Grant were prior consistent statements excluded from the definition of hearsay and admissible under § 27-801(4)(a)(ii), which provides:

(4) A statement is not hearsay if:

(a) The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (ii) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive[.]

While this rule has no explicit requirement relating to the timing of prior consistent statements, this court has adopted the reasoning of the U.S. Supreme Court in *Tome v. United States*, 513 U.S. 150, 115 S. Ct. 696, 130 L. Ed. 2d 574 (1995), which concluded that a prior consistent statement must have been made before the motive to fabricate arose in order to be admissible. This court has stated:

In order to minimize the amount of judicial discretion and therefore control the admissibility of evidence by rule as much as possible, we interpret rule 801(4)(a)(ii) to permit the introduction of a declarant's consistent out-of-court statements to rebut a charge of recent fabrication or improper influence or motive only when those statements were made before the charged recent fabrication or improper influence or motive.

State v. Morris, 251 Neb. 23, 33-34, 554 N.W.2d 627, 633-34 (1996).

The district court, in rejecting Neal's argument that § 27-801(4)(a)(ii) permitted him to call Thornton and Grant, reasoned that "the statements you're going to offer that the defendant made to those ladies occurred sometime at least hours after this act had occurred, and as such I'm going to sustain the State's motion." Thus, the district court concluded that Neal's motive to fabricate arose at the time the crime was committed and that, therefore, the statements made to Thornton and Grant did not comport with § 27-801(4)(a)(ii). As a result, the district court concluded that § 27-801(4)(a)(ii) was not applicable.

The State does not argue in its brief that Neal was not the declarant of the statements made to Thornton and Grant or that

those statements were not consistent with Neal's trial testimony. See *State v. Roenfeldt*, 241 Neb. 30, 486 N.W.2d 197 (1992). See, also, *U.S. v. Vest*, 842 F.2d 1319 (1st Cir. 1988), *cert. denied* 488 U.S. 965, 109 S. Ct. 489, 102 L. Ed. 2d 526 (holding that trial testimony and out-of-court statements need not be entirely consistent for statement to be considered consistent under this exclusion); G. Michael Fenner, *The Hearsay Rule* ch. 2B(4) (2003) (citing *Vest*, *supra*, to suggest that trial testimony and out-of-court statement need not be entirely consistent to fit under exclusion). Further, the record is clear that Neal testified and was subject to cross-examination. Moreover, the record discloses that an implied "charge of recent fabrication or improper influence or motive" was made by the State. As noted previously, during the State's cross-examination, Neal was asked, *inter alia*:

And once you were arrested in this case, at some point in time you became aware of all of the information through the police reports, the DNA reports, the reports regarding the fingerprints, as to what sort of evidence the police had against you in this case; isn't that right?

That such question implies Neal fabricated his testimony regarding his motivation for killing Morris becomes inescapable when viewed in context with the State's closing argument as previously set forth.

Having determined the record supports Neal's claim that the State's question implied Neal fabricated his testimony, we now consider the issue of whether the statements made to Thornton and Grant were made "before the charged recent fabrication or improper influence or motive." See *State v. Morris*, 251 Neb. at 34, 554 N.W.2d at 634. As noted previously, the district court determined that any such motive arose at the time the crime was committed, thus the statements were inadmissible. Neal, however, argues that any motive he might have had to fabricate his story in the manner implied by the State would not arise until he had learned of the evidence against him, in other words, after his arrest.

The State's question to Neal on cross-examination implied that he fabricated his motive testimony given the forensic evidence found at the scene. The very nature of such a charge requires that any fabrication could not have occurred until Neal was aware of

the forensic evidence. The record discloses that such knowledge would not have occurred until after Neal's arrest. At the time Neal made his statements to Thornton and Grant, he had not been arrested nor had he given any statement to law enforcement. Accordingly, it is not possible for Neal's motive to fabricate to have arisen prior to the time he made his statements to Thornton and Grant.

We further note that the State, in its brief, does not offer any argument in support of the district court's determination that Neal's motive to fabricate arose at the time the crime was committed. The State instead argues:

The questions asked by the prosecutor were simple questions concerning the defendant's knowledge of the evidence in this case. The record does not reflect that the prosecutor ever asked the defendant whether he modified his story to "fit" the evidence which appears to be what the defendant is now claiming is implied by these questions. . . . The only thing implied by these questions and answers is that the defendant's knowledge of the evidence possessed by the State was very limited, which could hardly be used to form an argument for the State that the defendant fabricated his testimony to fit the evidence.

Brief for appellee at 11-12.

In support of this argument, the State relies on *State v. Buechler*, 253 Neb. 727, 733, 572 N.W.2d 65, 70 (1998), wherein this court stated that "[a]ttempts at impeachment cannot be equated to charges of recent fabrication." In *Buechler*, the defendant testified on direct examination that he had been threatened by the victim. During cross-examination, the State attempted to impeach this testimony by noting that there was no mention of any threats by the victim in Buechler's recorded confession and also by establishing that the defendant had not realized that his confession was being recorded.

Buechler is distinguishable. In *Buechler*, we recognized that it is sometimes difficult to determine whether a question attempts impeachment or "rises to the level of a charge [of] a recent fabrication." 253 Neb. at 733, 572 N.W.2d at 70. We stated that "[w]e will not find abuse of discretion where, as here, the impeachment is susceptible of either interpretation." *Id.*, quoting *Thomas v.*

U.S., 41 F.3d 1109 (7th Cir. 1994). We have no such difficulty in this case. Viewing the State's question in the context of its closing argument convinces us that in this case, it is not "susceptible of either interpretation."

The State's argument further overlooks the fact that § 27-801(4)(a)(ii) provides for both express and implied charges of recent fabrication. While the State is correct in stating that the State's question to Neal never expressly accused him of modifying "his story to 'fit' the evidence," the State's question clearly implied such fabrication. This implication was reinforced during the State's closing argument.

As a result of the foregoing, we hold that the statements made to Thornton and Grant were admissible as prior consistent statements under § 27-801(4)(a)(ii) and that the district court's ruling to the contrary was clearly erroneous. See *State v. Rieger*, 260 Neb. 519, 618 N.W.2d 619 (2000).

HARMLESS ERROR

Having concluded that the district court erred in not allowing Thornton's and Grant's testimonies to be admitted pursuant to § 27-801(4)(a)(ii), we must now determine whether such error was harmless.

[5] In a jury trial of a criminal case, an erroneous evidentiary ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt. *State v. Harrold*, 256 Neb. 829, 593 N.W.2d 299 (1999); *State v. Buechler*, *supra*.

[6] Harmless error review looks to the basis on which the jury actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error. *State v. Canady*, 263 Neb. 552, 641 N.W.2d 43 (2002); *State v. Trotter*, 262 Neb. 443, 632 N.W.2d 325 (2001).

At trial, Neal did not dispute that he killed Morris, claiming instead that Morris' death was not first degree murder but manslaughter. Neal's claim was that he had fallen asleep in a chair and had awakened to discover his penis had been exposed by Morris; he then stood up, and with Morris below him,

struck him. Such an explanation is not inconsistent with Roffman's testimony:

[Neal's counsel:] Okay. Did the location of those wounds suggest anything to you —

....

Q. — about the position of the victim's body?

[Roffman:] It would appear he was struck from behind.

Q. Or someone standing over him?

A. More likely from behind. *But unless the individual, the victim, was lower and the person was standing in front over him, that would be also possible.*

(Emphasis supplied.) After Neal presented his version of the events surrounding Morris' death, including his motivation for committing the crime, the State, in cross-examination, implied that this version had been fabricated to meet the forensic evidence discovered at the scene. In response, Neal attempted to introduce his own prior consistent statements, which rebutted the State's implied charge of fabrication and tended to corroborate Neal's story regarding his motivation. The evidence Neal thus sought to introduce went to the very essence of his defense and would be "possible," given Roffman's testimony. As such, we cannot determine the actual guilty verdict was surely unattributable to the error and that as a result, the error was harmless beyond a reasonable doubt. See *State v. Canady, supra*.

REMAINING ASSIGNMENTS OF ERROR

Since we have concluded that the district court erred in not admitting Thornton's and Grant's testimonies under § 27-801(4)(a)(ii) and that such error was not harmless, we need not consider Neal's remaining assignments of error.

REVERSED AND REMANDED FOR A NEW TRIAL.

CITY OF SCOTTSBLUFF, A POLITICAL SUBDIVISION OF THE
STATE OF NEBRASKA, APPELLANT, v. EMPLOYERS MUTUAL
INSURANCE COMPANY, AN INSURANCE COMPANY
AUTHORIZED TO DO BUSINESS IN NEBRASKA, APPELLEE.
658 N.W.2d 704

Filed April 4, 2003. No. S-02-398.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Summary Judgment: Final Orders: Appeal and Error.** Although the denial of a motion for summary judgment, standing alone, is not a final, appealable order, when adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy that is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct further proceedings as it deems just.
4. **Insurance: Contracts: Appeal and Error.** The interpretation of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination made by the lower court.
5. **Insurance: Contracts.** An insurance policy is a contract.
6. **Insurance: Contracts: Intent.** An insurance contract is to be construed as any other contract to give effect to the parties' intentions at the time the contract was made.
7. **Insurance: Contracts: Parties.** Parties to an insurance contract may contract for any lawful coverage, and an insurer may limit its liability and impose restrictions and conditions upon its obligations under the contract if the restrictions and conditions are not inconsistent with public policy or statute.
8. **Insurance: Contracts.** While an ambiguous insurance policy will be construed in favor of the insured, ambiguity will not be read into policy language which is plain and unambiguous in order to construe against the preparer of the contract.
9. **Insurance: Contracts: Liability.** Generally, where the event for which an insured seeks coverage is plainly outside the scope of the coverage encompassed in the policy according to a plain reading of its terms, an insurer may not be obligated to provide coverage to the insured.
10. **Insurance: Contracts: Claims.** Although a liability insurer is legally obligated to defend all suits against the insured, even if groundless, false, or fraudulent, the insurer is not bound to defend a suit based on a claim outside the coverage of the policy.

Appeal from the District Court for Scotts Bluff County:
RANDALL L. LIPPSTREU, Judge. Affirmed.

Paul E. Hofmeister, of Chaloupka, Holyoke, Hofmeister, Snyder & Chaloupka, P.C., L.L.O., and Steven C. Smith, of Pahlke, Smith, Snyder, Petitt & Eubanks, P.C., L.L.O., for appellant.

Terrance O. Waite and Keith A. Harvat, of Waite, McWha & Harvat, for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, McCORMACK, and MILLER-LEMAN, JJ.

GERRARD, J.

NATURE OF CASE

The City of Scottsbluff is suing for coverage under the insurance contract it has with Employers Mutual Insurance Company (EMC). On September 3, 1999, Scottsbluff experienced a large amount of rainfall. On that day, several homeowners sustained water and sewage accumulation in their basements and consequently sued the city for damages. Responding to a request from the city, EMC refused to cover these damages and refused to supply the city a defense, alleging that the damages fell within an exclusion of the insurance contract. The city and some of the homeowners settled the claims between themselves, and the city now seeks to have EMC reimburse it for these settlement payments. The district court granted EMC's motion for summary judgment and denied the city's motion for summary judgment. In its order, the district court found that the damage to the homes was not covered by the insurance policy. The city appeals.

FACTUAL BACKGROUND

The facts are largely undisputed. On or about September 3, 1999, the city experienced a heavy rainfall. This same day, several homeowners in the Westmoor area of the city suffered damage to their homes by water and sewage entering and accumulating in their basements. Many of these homeowners filed claims against the city for these damages. The city notified its insurer, EMC, of these claims and requested that EMC acknowledge coverage and provide a defense. EMC responded on November 19 by denying both the coverage and the defense, indicating that the

damage to the homes fell within an exclusion found in section VI, paragraph 5, of an endorsement to the insurance policy. That exclusion reads:

This insurance does not apply to “bodily injury,” “property damage,” “personal injury” or “advertising injury” arising out of any hazard listed below, unless that hazard is specifically declared in the policy schedule and the applicable premium is shown.

5. The overflow of rivers or streams, or the flooding of basements, or damage to property caused by the backing up of sanitary sewers or the backing up of water in storm sewers, drains or other facilities due to the runoff of precipitation, surface waters or flood.

At least 11 of the homeowners’ claims against the city were settled between September 25 and November 9, 2000. The city filed a petition with the district court for Scotts Bluff County on October 11, 2000, seeking reimbursement from EMC under the insurance policy for the obligations flowing from the settlement agreements it had made and would make with the aggrieved homeowners.

The city filed a motion for summary judgment on October 9, 2001, and EMC filed its motion for summary judgment on November 8. After a December 11 hearing, the court entered an order, granting EMC’s motion for summary judgment and denying the city’s motion for summary judgment. The court considered that the damage to the homes may have been caused by either ground water seepage or sanitary sewer backup, or by a combination of the two. According to the court, the insurance policy terms excluded coverage for damage caused by sanitary sewer backup. Therefore, the court determined that to the extent the damage was caused by the backing up of the sanitary sewers, EMC was not liable because the policy excludes it.

The court further found that the city would not be liable to the homeowners for damage caused by ground water seepage and that as a result, the insurance policy did not cover such damage. Therefore, the court determined that to the extent the damage was caused by ground water seepage, EMC was not liable because the city was not liable. Since ground water seepage and

sanitary sewer backup were alleged to be the only causes of the damage, EMC was not liable. Accordingly, the district court granted EMC's motion for summary judgment and denied the city's motion for summary judgment. The city timely appeals.

ASSIGNMENTS OF ERROR

The city assigns, restated, that the district court erred by (1) finding that the policy excluded from coverage damage caused by the backup of the sanitary sewer system, (2) finding that the city had no legal liability to the affected homeowners for damage caused by ground water seepage, (3) finding that the insurance policy did not cover damage caused by ground water seepage, and (4) sustaining EMC's motion for summary judgment and overruling the city's motion for summary judgment.

STANDARD OF REVIEW

[1] Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Continental Cas. Co. v. Calinger*, ante p. 557, 657 N.W.2d 925 (2003).

[2] In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Finch v. Farmers Ins. Exch.*, ante p. 277, 656 N.W.2d 262 (2003).

[3] Although the denial of a motion for summary judgment, standing alone, is not a final, appealable order, when adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy that is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct further proceedings as it deems just. *Id.*

[4] The interpretation of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination made by the lower court. *Id.*

ANALYSIS

In its consideration of the motions for summary judgment, the district court made no findings regarding the cause of the damage. Neither party alleged that the cause was other than some combination of sanitary sewer backup and ground water seepage, although EMC denied any of it was caused by ground water seepage. The court then considered each cause separately to determine whether this factual dispute might be material, precluding summary judgment.

SANITARY SEWER BACKUP

[5-8] The court found that the portion of damage caused by the sanitary sewer backup fell under an exclusion in the insurance contract. The city assigns this finding as error. Familiar general principles guide our determination whether, as a matter of law, the claimed coverage exclusion applies to the undisputed facts of this case. An insurance policy is a contract. *Neff Towing Serv. v. United States Fire Ins. Co.*, 264 Neb. 846, 652 N.W.2d 604 (2002). An insurance contract is to be construed as any other contract to give effect to the parties' intentions at the time the contract was made. *Finch, supra*. Parties to an insurance contract may contract for any lawful coverage, and an insurer may limit its liability and impose restrictions and conditions upon its obligations under the contract if the restrictions and conditions are not inconsistent with public policy or statute. *Neff Towing Serv., supra*. While an ambiguous insurance policy will be construed in favor of the insured, ambiguity will not be read into policy language which is plain and unambiguous in order to construe against the preparer of the contract. *Finch, supra*.

The insurance contract excludes damages caused by "[t]he overflow of rivers or streams, or the flooding of basements, or damage to property caused by the backing up of sanitary sewers or the backing up of water in storm sewers, drains or other facilities due to the runoff of precipitation, surface waters or flood." The city reads the phrase "due to the runoff of precipitation, surface waters or flood" to modify the damage caused by the backing up of sanitary sewers as well as of the storm sewers. The city then contends that the sanitary sewer backup was not due to the runoff of precipitation, surface waters, or flood, thus falling

outside this exclusion. However, a plain reading of the contract does not support the city's position.

We determine that the phrase "due to the runoff of precipitation, surface waters or flood" modifies "the backing up of water in storm sewers, drains or other facilities" and does not modify "the backing up of sanitary sewers." This conclusion is drawn from both the context and the contractual scheme. As the district court noted, the runoff of precipitation, surface waters, and floods directly affects only an open sewer system like the storm sewer system. A closed sewer system, such as a sanitary sewer system, is not directly affected by such water. The modifying phrase, in its plain and ordinary meaning, limits only the storm sewer damage. The storm sewer system fails and causes damage to the public when water backs up due to the runoff of precipitation, surface waters, or flood. The sanitary sewer system, on the other hand, fails and causes damage to the public by simply backing up.

It is clear that the limitation to damages caused only by runoff of precipitation, surface water, and flood does not apply to the sanitary sewer system exclusion. We determine that the ordinary meaning of the plain language of this paragraph excludes from coverage: (1) the overflow of rivers or streams, or (2) the flooding of basements, or (3) damage to property caused by (a) the backing up of sanitary sewers, or (b) the backing up of water in storm sewers, drains, or other facilities due to the runoff of precipitation, surface waters, or flood.

The district court concluded that the portion of the damage not attributable to ground water seepage was "damage to property caused by the backing up of sanitary sewers." This damage, falling as it does under this exclusion, is not covered by EMC. The city's first assignment of error is without merit.

GROUNDWATER SEEPAGE

Considering the damages caused by the ground water seepage, the court found that this damage is also not covered by the insurance contract. The city claims the court erred. Since the insurance contract by its own language covers only the sums the insured is "legally obligated to pay" to the injured, see section I, coverage A, paragraph 1a, the dispositive question is whether

the city was legally obligated to the Westmoor area homeowners for the damage to their homes.

The court found that the city was not legally liable to the Westmoor area homeowners for that portion of the damage caused by ground water seepage. The court based this conclusion on the absence of any causally related act or omission attributable to the city—essentially the lack of any breach of duty. The city posits two grounds for reversing the court’s finding that the city did not have any legal liability to the homeowners for damage caused by ground water seepage: (1) even if the city is not legally liable in tort, the city is legally liable in contract by operation of the settlement agreements, and (2) the contractual exclusion of the settlement agreements should not have been considered by the court, and even if it were, it is ambiguous and should have been construed to favor the insured to afford coverage.

[9] Generally, where the event for which an insured seeks coverage is plainly outside the scope of the coverage encompassed in the policy according to a plain reading of its terms, an insurer may not be obligated to provide coverage to the insured. *Neff Towing Serv. v. United States Fire Ins. Co.*, 264 Neb. 846, 652 N.W.2d 604 (2002). An insurance contract is to be construed as any other contract to give effect to the parties’ intentions at the time the contract was made. *Finch v. Farmers Ins. Exch.*, ante p. 277, 656 N.W.2d 262 (2003).

The contract in the instant case states that EMC

will pay those sums that the insured becomes legally obligated to pay as damages because of [damage] to which this insurance applies. We will have the right and duty to defend the insured against any “suit” seeking those damages. However, we will have no duty to defend the insured against any “suit” seeking damages for [damage] to which this insurance does not apply.

Section I, coverage A, paragraph 1a. We determine that the plain meaning of the phrase “becomes legally obligated to pay” is limited to those obligations which flow as a direct consequence of an “‘occurrence,’” defined within the contract. The city was not legally liable to pay the homeowners for those damages caused by ground water seepage. The eventual obligation in contract came as a result of the city’s voluntary agreement with certain

individuals, which does not in this instance legally bind the third-party insurance carrier. The parties to the insurance contract at the time the contract was made could not have reasonably intended it to cover the voluntary agreements of the insured to pay for damage it was not otherwise legally obligated to pay.

[10] The city also alleges that EMC was obligated to defend them against the homeowner suits. Although a liability insurer is legally obligated to defend all suits against the insured, even if groundless, false, or fraudulent, the insurer is not bound to defend a suit based on a claim outside the coverage of the policy. *Neff Towing Serv., supra*. Similarly, the contractual duty to defend covers suits seeking damages only “to which this insurance applies.” The district court was correct in its conclusion that the city was in fact under no legal obligation regarding damages caused by ground water seepage. Because the city was not legally liable, EMC was under no duty to defend or indemnify the city.

Next, the city claims that the provision which excludes from coverage any contractual assumption of liability by the city is an affirmative defense. The city further alleges both that EMC’s failure to raise this defense amounts to waiver or estoppel and that the exclusion is ambiguous and should be read to afford coverage. However, neither EMC in its answer nor the district court in its decision relied upon this exclusion. The ground water seepage damage simply falls outside the scope of the insurance contract. The fact that the damages here also fall under a contract exclusion does not change the soundness of the court’s actual basis for its decision.

Lastly, the city argues that the only issue actually before the court was whether the damages caused by sanitary sewage are covered by the policy, since this was the only source of damages conceded by EMC and the only contingency for which EMC prepared a defense. As a result, the city contends, the court erred in considering either the city’s liability toward the Westmoor area homeowners or the insurance policy’s coverage of damages caused by ground water seepage. However, in its pleadings, the city alleged that the damage resulted from either the sanitary sewage backup or the ground water seepage. Since EMC alleged that the damage was caused completely by the sanitary sewage backup, this was an issue of fact. Before the court could rule on

either motion for summary judgment, it had to determine whether these disputed facts were material. Summary judgment would have been inappropriate had the facts in dispute been material. See *Continental Cas. Co. v. Calinger*, ante p. 557, 657 N.W.2d 925 (2003).

The court analyzed the case, as was proper on a motion for summary judgment, assuming without deciding that the damage might have been caused in either or both ways, as suggested by the city. Having considered that some of the damage may have been caused by ground water seepage, the court was dutybound to determine the ultimate inferences that may be drawn from those facts, see *id.*, in particular, whether the insurance contract covered damages so caused. As we have determined above, the answer to that question flows in part from whether the city had become legally liable to the homeowners for that damage. The court appropriately considered both the insurance policy's coverage of damages caused by ground water seepage and the city's liability toward the Westmoor area homeowners. We conclude that the district court did not err in denying the city's motion for summary judgment or in granting EMC's motion for summary judgment, finding EMC not liable to indemnify or defend the city for any damages set forth in the operative petition.

CONCLUSION

The district court correctly determined both that damages caused by sanitary sewer backup fell into an exclusion to the insurance contract and that damages caused by ground water seepage fell outside the scope of the insurance contract. Without any issues of material fact and without any duty of EMC to defend or indemnify the city flowing from the ultimate inferences that may be drawn from the settled facts, summary judgment was proper. The judgment of the district court is affirmed.

AFFIRMED.

BRIAN M. HALL, APPELLANT, V. AUTO-OWNERS
INSURANCE COMPANY, APPELLEE.
658 N.W.2d 711

Filed April 4, 2003. No. S-02-491.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. _____. In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Insurance: Contracts: Appeal and Error.** The interpretation of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination made by the lower court.
4. **Insurance: Contracts.** An insurance policy is a contract.
5. **Contracts.** When the terms of the contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as the ordinary or reasonable person would understand them.
6. **Insurance: Contracts.** A court interpreting a contract, such as an insurance policy, must first determine, as a matter of law, whether the contract is ambiguous.
7. **Contracts: Words and Phrases.** A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
8. **Names.** Doing business under another name or several names does not create an entity separate and distinct from the person operating the business.

Appeal from the District Court for Douglas County: PATRICIA A. LAMBERTY, Judge. Affirmed.

Michael F. Coyle and Timothy J. Thalken, of Fraser, Stryker, Meusey, Olson, Boyer & Bloch, P.C., for appellant.

Daniel P. Chesire and Raymond E. Walden, of Lamson, Dugan & Murray, L.L.P., for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, McCORMACK, and MILLER-LERMAN, JJ.

McCORMACK, J.

NATURE OF CASE

Brian M. Hall appeals from the entry of summary judgment in favor of Auto-Owners Insurance Company (Auto-Owners). The district court for Douglas County determined that an insurance

policy issued by Auto-Owners did not provide coverage for injuries sustained by Hall and that Auto-Owners was entitled to judgment as a matter of law. The question presented by this appeal is whether an individual doing business as a sole proprietor under a trade name is a separate legal entity. We answer the question in the negative and affirm the judgment of the district court.

BACKGROUND

This case stems from a May 22, 1996, automobile accident. Sixteen-year-old Justin Gearhart was the driver of a 1979 Pontiac Trans Am when he was involved in an accident at the intersection of LaPlatte Road and Highway 75 in Sarpy County. Justin died as a result of his injuries, and Hall, a passenger in the Trans Am, was seriously injured. The Trans Am was owned by Kenneth Gearhart (Gearhart) and Rhonda Gearhart, Justin's parents. Prior to the accident, the Trans Am had been rebuilt at Gearhart's business, Kenny's Truck Repair. Gearhart is the sole proprietor of Kenny's Truck Repair.

Following the accident, Hall's father, Thomas S. Hall, individually and as next friend for Hall, filed a negligence action against, among others, Gearhart. At trial, the parties stipulated that Justin was negligent in operating the vehicle and that Justin's negligence was the proximate cause of the collision. The parties further stipulated that Gearhart was liable to Hall's father pursuant to the family purpose doctrine and that Hall's damages were proximately caused by the negligence of Gearhart. The only issue addressed at trial was the amount of damages, which was resolved with the court's entering judgment in favor of Hall's father and against Gearhart for more than \$11.8 million. At oral argument, Hall's counsel stated that Hall had received \$1.8 million of this sum from defendants other than Gearhart. After the judgment was entered, Gearhart assigned to Hall any claims and causes of action Gearhart had against Auto-Owners.

Hall brought this declaratory judgment action against Auto-Owners, seeking a declaration that an Auto-Owners insurance policy issued to Gearhart, in effect at the time of the accident, provided coverage for Hall's injuries. The policy includes two types of coverage at issue here—commercial general liability (CGL) coverage and garage liability coverage.

Under section I of the garage liability coverage provisions, Auto-Owners agreed “[t]o pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law, or assumed under any contract as defined herein, for damages” due to “bodily injury . . . neither expected nor intended from the standpoint of the insured and arising out of the hazards defined in Section II of this coverage form.”

The applicable division of section II of the garage liability coverage defines hazards as follows:

The insurance under this division covers the ownership, maintenance, occupation or use of the premises for the purposes of an automobile repair shop, service station, storage garage or public parking place and all operations which are necessary or incidental thereto, including the use for any purpose in connection with the foregoing of any automobile not hired, registered or owned in whole or in part by the named insured, any partner or officer thereof.

Section I of the CGL coverage provisions states, in relevant part, “We will pay those sums that the insured becomes legally obligated to pay as damages because of ‘bodily injury’ or ‘property damage’ to which this insurance applies.” However, the policy excludes coverage for “‘[b]odily injury’ or ‘property damage’ arising out of the ownership, maintenance, use or entrustment to others of any aircraft, ‘auto’ or watercraft owned or operated by or rented or loaned to any insured.” The declarations pages of the insurance policy designate “KENNETH L GEARHART DBA KENNYS TRUCK REPAIR” as the insured.

Each party filed for summary judgment. At the summary judgment hearing, the insurance policy was received into evidence. In addition, Hall offered, and the court received, several other insurance documents into evidence. These documents variously listed the insured as “Kenny’s Truck Repair, Kenneth L. Gearhart dba,” “Kenneth L. Gearhart,” or “Kenny’s Truck Repair.”

On April 18, 2002, the district court granted Auto-Owners’ motion for summary judgment and denied Hall’s motion for summary judgment. The court, relying on a number of cases from other jurisdictions, determined that Kenny’s Truck Repair was not a legal entity separate and distinct from Gearhart. Thus, the court

found that the insurance policy did not provide coverage for Hall's injuries where the automobile in question was owned by the insured. Hall filed a timely appeal, and we moved the case to our own docket.

ASSIGNMENTS OF ERROR

Hall assigns that the district court erred in (1) finding that the identity of the named insured under the garage liability and CGL provisions of the policy was not ambiguous as a matter of law, (2) finding that "Kenneth L. Gearhart" was the named insured under both the garage liability and CGL provisions, (3) granting summary judgment based on the owned automobile exclusion of the garage liability and CGL provisions, (4) denying Hall's cross-motion for summary judgment based on the owned automobile exclusion of the garage liability and CGL provisions, and (5) entering summary judgment in favor of Auto-Owners.

STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. Neb. Rev. Stat. § 25-1332 (Cum. Supp. 2002); *Finch v. Farmers Ins. Exch.*, ante p. 277, 656 N.W.2d 262 (2003). In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

[3] The interpretation of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination made by the lower court. *Id.*

ANALYSIS

[4-6] An insurance policy is a contract. *American Fam. Mut. Ins. Co. v. Hadley*, 264 Neb. 435, 648 N.W.2d 769 (2002). When the terms of the contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as the ordinary or reasonable person would

understand them. *Reisig v. Allstate Ins. Co.*, 264 Neb. 74, 645 N.W.2d 544 (2002). Under Nebraska law, a court interpreting a contract, such as an insurance policy, must first determine, as a matter of law, whether the contract is ambiguous. *Id.*

Under the CGL provisions of the insurance policy, coverage is excluded for bodily injury arising out of the “ownership, maintenance, use or entrustment to others of any . . . ‘auto’ . . . owned . . . by . . . any insured.” (Emphasis supplied.) Similarly, coverage under the garage liability provisions extends to bodily injury arising from “the use . . . of any automobile *not . . . owned in whole or in part by the named insured.*” (Emphasis supplied.) Thus, we must determine if the automobile in this case is owned by the insured, where the automobile is owned by Gearhart and the insured is designated as “KENNETH L GEARHART DBA KENNYS TRUCK REPAIR.”

[7] Hall contends that the district court erred in finding that the identity of the insured in the insurance policy was not ambiguous as a matter of law. A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. *Reisig v. Allstate Ins. Co.*, *supra*. In addition to the policy declarations pages, where the insured is designated as “KENNETH L GEARHART DBA KENNYS TRUCK REPAIR,” Hall relies on other documents in the record variously listing the insured as “Kenny’s Truck Repair,” “Kenny’s Truck Repair, Kenneth L. Gearhart dba,” or “Kenneth L. Gearhart.” In effect, Hall argues that Kenny’s Truck Repair is an entity separate from Gearhart and that, therefore, the automobile is not owned by the insured.

[8] We are not persuaded by Hall’s argument. The Nebraska Court of Appeals has recognized that doing business under another name or several names does not create an entity separate and distinct from the person operating the business. *Toulousaine de Distrib. v. Tri-State Seed & Grain*, 2 Neb. App. 937, 520 N.W.2d 210 (1994). Many courts in other jurisdictions are in agreement. See, e.g., *O’Hanlon v. Hartford Acc. & Indem. Co.*, 639 F.2d 1019 (3d Cir. 1981) (holding that where insured purchases policy in trade name, policy will be viewed as if issued in his given name); *Duval v. Midwest Auto City, Inc.*, 425 F. Supp. 1381 (D. Neb. 1977), *affirmed* 578 F.2d 721 (8th Cir. 1978);

Pinkerton's v. Superior Court (Schrieber), 49 Cal. App. 4th 1342, 57 Cal. Rptr. 2d 356 (1996); *Providence Wash. Ins. v. Valley Forge*, 42 Cal. App. 4th 1194, 50 Cal. Rptr. 2d 192 (1996); *Allstate Ins. Co. v. Willison*, 885 P.2d 342 (Colo. App. 1994); *Chmielewski v. Aetna Cas. and Sur. Co.*, 218 Conn. 646, 668, 591 A.2d 101, 113 (1991) ("property owned by an individual in a trade name is nonetheless owned by him"); *Purcell v. Allstate Ins. Co.*, 168 Ga. App. 863, 310 S.E.2d 530 (1983); *Samples v. Ga. Mutual Ins. Co.*, 110 Ga. App. 297, 138 S.E.2d 463 (1964) (holding that fact that plaintiff's husband purchased automobile in name that he used in doing business does not contradict fact that he owned automobile as individual); *Georgantas v. Country Mut. Ins. Co.*, 212 Ill. App. 3d 1, 570 N.E.2d 870, 156 Ill. Dec. 394 (1991); *Trombley v. Allstate Ins. Co.*, 640 So. 2d 815 (La. App. 1994); *Bushey v. Northern Assurance*, 362 Md. 626, 637, 766 A.2d 598, 603 (2001) ("sole proprietorship form of business provides 'complete identity of the business entity with the proprietor himself'"); *Gabrelcik v. National Indemnity Co.*, 269 Minn. 445, 131 N.W.2d 534 (1964); *Carlson v. Doekson Gross, Inc.*, 372 N.W.2d 902, 906 (N.D. 1985) (holding that "when the designation of the named insured is in the form 'Individual dba . . . ' the individual is the named insured, irrespective of whatever language follows the 'dba'"); *Recalde v. ITT Hartford*, 254 Va. 501, 492 S.E.2d 435 (1997) (holding that individual owner and proprietorship are single entity in insurance context). We recognize that some courts have diverged from this rule, although not without criticism. See, *Rosen v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 249 So. 2d 701 (Fla. App. 1971); *Consolidated American Ins. Co. v. Landry*, 525 So. 2d 567 (La. App. 1988); *Hertz Corp. v. Ashbaugh*, 94 N.M. 155, 607 P.2d 1173 (N.M. App. 1980). See, *Providence Wash. Ins. v. Valley Forge*, 42 Cal. App. 4th at 1202, 50 Cal. Rptr. 2d at 196 (stating "*Ashbaugh* is inattentive to the force of the principle that a trade name does not create a separate entity and wrongly relies on cases finding individual partners distinct from the insured partnership" and questioning validity of *Landry* in light of *Trombley*); *Recalde v. ITT Hartford*, *supra* (finding *Ashbaugh* unpersuasive because *Ashbaugh* court relied upon inapposite case involving insurance issued to partnership).

We conclude that the insured in this case (“KENNETH L GEARHART DBA KENNYS TRUCK REPAIR”) was not a legal entity separate and distinct from the owner of the automobile in question (Gearhart). This conclusion provides a distinction between the case at bar and *Townley v. Whetstone*, 190 Neb. 541, 209 N.W.2d 350 (1973), upon which Hall relies. In *Townley*, this court held that an automobile owned by Martin J. Whetstone was not “owned by the ‘named insured’” where the named insured consisted of two different individuals, “Larry W. and Martin J. Whetstone,” each with separate legal identities. 190 Neb. at 544-45, 209 N.W.2d at 352. We held that the policy language “could reasonably be construed as meaning that only both together, not either one alone, constituted the ‘named insured.’” *Id.* The policy language at issue in this case cannot be so construed. The garage liability coverage clearly provides that it does not extend to a vehicle “owned in whole or in part by the named insured,” and the CGL provisions exclude coverage for vehicles owned by “any insured.” The only reasonable construction of these unambiguous policy provisions is that no coverage is provided for a vehicle in which the insured, Gearhart, has either a sole or joint ownership interest.

CONCLUSION

In the present case, the insurance policy was not ambiguous because Gearhart is legally identical to “KENNETH L GEARHART DBA KENNYS TRUCK REPAIR.” The insurance policy did not extend coverage to the injuries suffered by Hall because the automobile was owned by the insured. Accordingly, the district court did not err in granting summary judgment in favor of Auto-Owners.

AFFIRMED.

the summary dismissal by the Nebraska Court of Appeals. The sole issue on appeal is whether the district court and Court of Appeals erred in dismissing the appeal for lack of jurisdiction for the reason that the appellants' praecipe was not filed with the clerk of the district court, as required by Neb. Rev. Stat. § 25-1905 (Reissue 1995), within the time period prescribed by Neb. Rev. Stat. § 25-1931 (Cum. Supp. 2002). For the reasons discussed below, we affirm.

BACKGROUND

On April 9, 2002, the Douglas County Board of Equalization (Board) granted continued approval of a partial property tax exemption to Community Health Vision, Inc., now known as Alegent Health, doing business as Lakeside Wellness Center (Lakeside). On April 23, the appellants filed a petition in error in the district court. The appellants alleged that the exemption from property tax granted by the Board to Lakeside was contrary to applicable statutes when the property considered as a whole is not used exclusively for exempt purposes. On the same date, the appellants filed a praecipe with the Douglas County clerk, the custodian of the Board's records. On May 28, the appellants filed a certificate of transcript with the district court, which was beyond the requirement of § 25-1931 that the certificate be filed 30 days after the rendition of judgment. In their respective answers, the appellees, the Board and Lakeside, alleged that the district court lacked jurisdiction over the proceeding in error because the appellants failed to file a transcript of the proceedings or praecipe with the district court, as required by § 25-1905, within the time period prescribed by § 25-1931. The appellees also filed separate motions for summary judgment.

In an order dated August 13, 2002, the district court sustained the appellees' motions for summary judgment. The court held that there were no issues of material fact and that the appellees were entitled to judgment as a matter of law. The court construed § 25-1905 to require that for jurisdiction to attach, a praecipe must be filed with the district court requested to review such judgment, and not with the tribunal, board, or officer charged with preparing the transcript. Therefore, the district court dismissed the appellants' petition in error for lack of jurisdiction because the

praecipe was not timely filed with the clerk of the district court. The appellants then filed an appeal, which was summarily dismissed on October 15, 2002, by the Court of Appeals on the same grounds as that of the district court. We granted the appellants' petition for further review.

ASSIGNMENTS OF ERROR

The appellants assign that the Court of Appeals erred in summarily dismissing their appeal and in (1) construing § 25-1905 to mean that the praecipe for transcript must be filed specifically with the clerk of the district court rather than with a tribunal, board, or officer charged with preparing the transcript and (2) concluding that Neb. Rev. Stat. § 77-202.04 (Cum. Supp. 2002) deprived the appellants of standing to challenge the granting by the Board of an exemption from taxation to the appellees.

STANDARD OF REVIEW

[1] The question of jurisdiction is a question of law, upon which an appellate court reaches a conclusion independent of the trial court. *Kansas Bankers Surety Co. v. Halford*, 263 Neb. 971, 644 N.W.2d 865 (2002); *Kovar v. Habrock*, 261 Neb. 337, 622 N.W.2d 688 (2001).

[2] Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Egan v. Stoler*, ante p. 1, 653 N.W.2d 855 (2002); *Governor's Policy Research Office v. KN Energy*, 264 Neb. 924, 652 N.W.2d 865 (2002); *In re Application No. C-1889*, 264 Neb. 167, 647 N.W.2d 45 (2002).

ANALYSIS

The sole issue on appeal is whether § 25-1905 requires a praecipe for transcript to be filed specifically with the court requested to review a judgment in order to confer jurisdiction on such court. The appellants construe § 25-1905 to require the praecipe to be filed with the tribunal, board, or officer charged with preparing the transcript. This is a matter of statutory interpretation.

Prior to 1991, § 25-1905 (Reissue 1989) provided in relevant part: "The plaintiff in error shall file with his petition a transcript

of the proceedings containing the final judgment or order sought to be reversed, vacated or modified.” The statute was amended in 1991. Section 25-1905 (Reissue 1995), now at issue in this appeal, provides in relevant part: “The plaintiff in error shall file with his or her petition a transcript of the proceedings *or a praecipe directing the tribunal, board, or officer to prepare the transcript of the proceedings*. The transcript shall contain the final judgment or order sought to be reversed, vacated, or modified.” (Emphasis supplied.) In addition to the filing requirements of § 25-1905, proceedings in error must be commenced within 30 days after rendition of the judgment or making of the final order. § 25-1931.

Prior to the amendment of § 25-1905, we have repeatedly held that where a proceeding in error pursuant to § 25-1905 is utilized seeking reversal, vacation, or modification of a final judgment or order, jurisdiction of a court does not attach until a petition and transcript, containing the final judgment or order, are filed in the court requested to review such judgment or order. See, *Transcon Lines, Inc. v. O’Neal*, 230 Neb. 31, 429 N.W.2d 718 (1988); *Clark v. Cornwell*, 223 Neb. 282, 388 N.W.2d 848 (1986); *Glup v. City of Omaha*, 222 Neb. 355, 383 N.W.2d 773 (1986); *Fisher v. Housing Auth. of City of Omaha*, 214 Neb. 499, 334 N.W.2d 636 (1983); *Marcotte v. City of Omaha*, 196 Neb. 217, 241 N.W.2d 838 (1976); *Lanc v. Douglas County Welfare Administration*, 189 Neb. 651, 204 N.W.2d 387 (1973); *Anania v. City of Omaha*, 170 Neb. 160, 102 N.W.2d 49 (1960). The requirement that a plaintiff in error shall file with his petition a transcript of the proceedings is mandatory and jurisdictional. *Glup v. City of Omaha*, *supra*; *Marcotte v. City of Omaha*, *supra*; *Anania v. City of Omaha*, *supra*. In the absence of a transcript as the statute requires, the court in which a petition in error is filed has no jurisdiction to proceed further than to dismiss the petition in error. *Anania v. City of Omaha*, *supra*.

[3-5] This being the construction of § 25-1905 prior to its 1991 amendment, we now consider the effect of the amendment. Statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Neb. Account. & Disc. v. Citizens for Resp. Judges*,

256 Neb. 95, 588 N.W.2d 807 (1999); *Kimball v. Nebraska Dept. of Motor Vehicles*, 255 Neb. 430, 586 N.W.2d 439 (1998). The amended version of § 25-1905 provides that “[t]he plaintiff in error shall file *with* his or her petition a transcript of the proceedings or a praecipe” (Emphasis supplied.) The amendment does not expressly change the jurisdictional requirements of prior case law. In determining the meaning of a statute, the applicable rule is that when the Legislature enacts a law affecting an area which is already the subject of other statutes, it is presumed that it did so with full knowledge of the preexisting legislation and the decisions of the Supreme Court construing and applying that legislation. *White v. State*, 248 Neb. 977, 540 N.W.2d 354 (1995). It is presumed that when a statute has been construed by the Supreme Court and the same statute is substantially reenacted, the Legislature gave to the language the significance previously accorded to it by the Supreme Court. *Brown v. Kindred*, 259 Neb. 95, 608 N.W.2d 577 (2000). Because the Legislature did not change the jurisdictional requirements, we conclude the statute’s plain language requires that for jurisdiction to attach, the transcript of the proceedings or praecipe must be filed specifically with the petition in error in the court requested to review such judgment. Our conclusion is consistent with the language of the statute and prior case law.

The appellants allege that to require the filing of the praecipe in the same court as the petition rather than with the tribunal, board, or officer charged with preparing the transcript leads to an absurd result contrary to the Legislature’s intent. The appellants assert that the praecipe is not self-executing and as such that the preparation of the transcript may be indefinitely delayed. We disagree. Prior to the 1991 amendment, § 25-1905 was silent as to how the petitioner was to secure the transcript. The appellants had the problem of obtaining the transcript from the tribunal and filing it with the district court within 30 days of the tribunal’s decision. After the 1991 amendment, filing of the praecipe for transcript with the clerk of the district court satisfied the 30-day appeal requirement, even if the tribunal did not timely prepare and furnish the transcript to the appellants for filing with the clerk of the district court.

In this case, the appellants timely filed the petition in error with the district court, but filed the praecipe with the county clerk. The appellants subsequently filed an untimely certificate of transcript with the district court. Because the appellants failed to timely file a transcript or praecipe with the petition in error in district court in accordance with § 25-1905, we conclude the court lacked jurisdiction to hear the case.

We also decline to address the appellants' assignment of error as to standing under § 77-202.04 because the court below did not have jurisdiction. Therefore, we affirm the summary dismissal by the Court of Appeals.

CONCLUSION

We conclude that in a proceeding in error, a plaintiff must file with the petition a transcript of the proceedings or praecipe in the court requested to review such judgment or order to confer jurisdiction on such court. Because the appellants failed to timely file a transcript or praecipe with the petition in district court, we conclude that the district court lacked jurisdiction to hear the case. Therefore, we affirm the summary dismissal by the Court of Appeals.

AFFIRMED.

ERICA J., APPELLEE, AND STATE OF NEBRASKA,
INTERVENOR-APPELLANT, V. DENNIS J. DEWITT, APPELLEE.
659 N.W.2d 315

Filed April 11, 2003. No. S-02-415.

1. **Modification of Decree: Child Support: Appeal and Error.** Modification of child support payments is entrusted to the trial court's discretion, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion.
2. **Child Support: Rules of the Supreme Court.** Deviations from the Nebraska Child Support Guidelines are permissible whenever the application of the guidelines in an individual case would be unjust or inappropriate.
3. **Child Support: Rules of the Supreme Court: Bankruptcy: Presumptions.** A payment to a bankruptcy plan in and of itself is not sufficient to rebut the presumption that the Nebraska Child Support Guidelines should be applied or to require a deviation from the guidelines to avoid an unjust result.

4. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
5. **Modification of Decree: Child Support: Time.** Absent equities to the contrary, the modification of child support orders should be applied retroactively to the first day of the month following the filing date of the application for modification.
6. **Modification of Decree: Child Support.** In a modification of child support proceeding, the child and custodial parent should not be penalized, if it can be avoided, by the delay inherent in our legal system.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Affirmed in part, and in part reversed and remanded with directions.

Anthony R. Medina for intervenor-appellant.

Michael A. Klusaw for appellee Dennis J. Dewitt.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LEMAN, JJ.

WRIGHT, J.

NATURE OF CASE

The State of Nebraska appeals from a judgment of the Douglas County District Court which adopted the findings of a district court referee concerning a child support modification.

SCOPE OF REVIEW

[1] Modification of child support payments is entrusted to the trial court's discretion, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion. *Gallner v. Hoffman*, 264 Neb. 995, 653 N.W.2d 838 (2002).

FACTS

A decree was entered on December 29, 1993, pursuant to the Uniform Reciprocal Enforcement of Support Act, which found that Dennis J. Dewitt is the father of Natasha J., who was born May 9, 1991. Dewitt was ordered to pay \$159.30 per month for her support and maintenance commencing January 1, 1994.

On December 15, 2000, the State, as intervenor, filed a petition for modification of child support. The petition alleged that

the Department of Health and Human Services (DHHS) had conducted a review of the decree pursuant to Neb. Rev. Stat. §§ 43-512.10 to 43-512.18 (Reissue 1998) and had determined that the current support obligation varied by more than 10 percent from the Nebraska Child Support Guidelines. The variation was alleged to be due to financial circumstances which had lasted at least 3 months and which were reasonably expected to last for an additional 6 months.

Dewitt denied that the child support obligation varied from the guidelines. He also requested a deviation from the guidelines based on the geographical difficulty of visitation with Natasha, who lives in Minnesota. The guidelines do not provide for a deviation based on the ease or difficulty of visitation, and the parties have not raised this issue on appeal.

After a hearing, the district court referee filed a report indicating that Dewitt worked for a baking company on a commission basis and earned an average of \$695 per week in gross wages. At the time of the hearing, Dewitt lived with his wife and their 4-year-old daughter. Dewitt's wife testified that she earned \$8.05 per hour as an assistant manager at a daycare.

In 1998, Dewitt and his wife began a repayment plan with the U.S. Bankruptcy Court for the District of Nebraska which required them to pay \$200 per month. Two years remained on the plan at the time of the hearing. In his report, the referee apportioned the \$200 bankruptcy obligation between Dewitt and his wife and concluded that \$100 should be deducted directly from Dewitt's child support obligation.

The referee also determined hypothetical child support for Dewitt's 4-year-old daughter and applied that figure as an allowable deduction from Dewitt's gross earnings to determine the child support payable for Natasha. The referee then allowed a credit of \$100 of the payment to the bankruptcy plan against the amount of monthly support in order to arrive at an adjusted child support obligation of \$345.58 for Natasha.

Although the petition for modification was filed December 15, 2000, and the referee's report was not filed until November 26, 2001, the referee found that the bankruptcy, the lack of evidence as to savings or other assets, and the proposed increase made it inequitable to make Dewitt solely responsible for the delay by

awarding child support retroactively. The referee therefore recommended that the district court modify the decree of support by increasing Dewitt's child support obligation to \$346 per month beginning November 1, 2001, and monthly thereafter until further order of the court.

The State filed an exception to the referee's report on December 3, 2001. On March 13, 2002, the district court overruled the State's exception and adopted the referee's report. The court ordered an increase in Dewitt's child support obligation to \$346 per month beginning November 1, 2001, payable until Natasha reached the age of majority, married, died, or became emancipated or self-sufficient, or until further order of the court. The State timely appealed.

ASSIGNMENTS OF ERROR

The State asserts that the district court abused its discretion (1) by giving Dewitt a direct credit against his child support obligation for his bankruptcy plan payment and (2) by ordering the modified child support obligation to be prospective rather than retroactive.

ANALYSIS

The State first argues that the district court erred in adopting the referee's recommendation granting Dewitt a direct credit for payments to his bankruptcy plan in the amount of \$100 per month. The State asserts that the referee's reliance on *State on behalf of Elsasser v. Fox*, 7 Neb. App. 667, 584 N.W.2d 832 (1998), is misplaced. The referee concluded that the bankruptcy plan payments are similar to the student loan payments in *State on behalf of Elsasser*.

In *State on behalf of Elsasser*, the district court refused to allow credit for student loan payments in calculating the amount of child support required. The Nebraska Court of Appeals disagreed, noting that deductions were allowed in child support calculations for fixed nonavoidable obligations such as taxes, Social Security, health insurance, mandatory retirement, and child support for other children. The court stated:

Education loan payments are of the same nature as the deductions that are allowed, that is, they are fixed, legally unavoidable monthly payments, and they have the long-term

effect of decreasing the former student's real income by the amount of the monthly payment. Unlike ordinary debts, an educational loan cannot, for most former students, be discharged in bankruptcy.

Id. at 674, 584 N.W.2d at 836.

The Court of Appeals reasoned that the student loan would benefit the child because the parent has obtained an education and that, therefore, the student loan should have been taken into account in the child support calculation. The court then deducted the monthly student loan payment from the net monthly income and calculated the child support accordingly.

The State argues that payments to a bankruptcy plan do not benefit a child throughout his or her life in the same manner as student loan payments. It argues that the minor child would be penalized for the noncustodial parent's financial irresponsibility.

We conclude that the district court erred in adopting the referee's report and recommendation concerning the child support payable by Dewitt and therefore abused its discretion in entering the order for increased support in the amount of \$346 per month.

[2] In *Sears v. Larson*, 259 Neb. 760, 612 N.W.2d 474 (2000), we held that paragraph C(5) of the guidelines allows a trial court in an appropriate case to deviate from the guidelines to allow a deduction from income based on a parent's student loan payment. Paragraph C of the guidelines provides that the guidelines shall be applied as a rebuttable presumption. However, pursuant to paragraph C(5), deviations from the guidelines are permissible "whenever the application of the guidelines in an individual case would be unjust or inappropriate." The guidelines allow deductions for taxes, Social Security, health insurance, mandatory retirement contributions, and child support for other children. Payments to a bankruptcy plan are not specifically provided for in the guidelines as a deduction or credit. See paragraph C(5).

[3] The Court of Appeals has held that a payment to a bankruptcy plan in and of itself is not sufficient to rebut the presumption that the guidelines should be applied or to require a deviation from the guidelines to avoid an unjust result. See *Lebrato v. Lebrato*, 3 Neb. App. 505, 529 N.W.2d 90 (1995). In *Lebrato*, the father testified that he could pay no more than \$700 per month for child support, in part because he was paying \$500 per month to a

bankruptcy plan. Although the Court of Appeals did not specifically resolve the question, it noted that the father had been paying far more than was required into a voluntary retirement plan, making his testimony “less than convincing.” See *id.* at 518, 529 N.W.2d at 98.

Other courts have considered the effect of bankruptcy plan payments in determining child support. The Montana Supreme Court reversed a modification order, finding that a deduction for bankruptcy payments was in error because it was not provided for under the state’s guidelines. See *In re Marriage of Nikolaisen*, 257 Mont. 1, 847 P.2d 287 (1993). The Tennessee Court of Appeals found that the trial court had erred in allowing a monthly deduction for a bankruptcy payment that was not included as an available deduction in the state’s guidelines. On remand, the trial court was directed to recalculate the husband’s income without considering the bankruptcy deduction. See *Creson v. Creson*, No. 02A01-9801-CH-00002, 1999 WL 65055 (Tenn. App. Feb. 12, 1999).

[4] In the present case, the district court adopted the referee’s report, in which the referee concluded that the bankruptcy plan was comparable to a student loan and therefore was a fixed obligation. Modification of child support payments is entrusted to the trial court’s discretion, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion. *Gallner v. Hoffman*, 264 Neb. 995, 653 N.W.2d 838 (2002). A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Id.*

From our de novo review of the referee’s report, we conclude that the referee erred in allowing a \$100 credit for the payments to Dewitt’s bankruptcy plan. The referee was not justified in crediting \$100 of the bankruptcy plan payment directly against the child support that was computed based upon the combined monthly net income of both parents. The district court erroneously adopted the recommendation by the referee concerning the bankruptcy plan payments, and we conclude that the court

abused its discretion. We therefore remand the cause to the district court for a recalculation of child support in accordance with this opinion.

We next address the State's claim that the modified support order should be applied retroactively. The application for modification was filed by the State on December 15, 2000. A responsive pleading was filed on February 20, 2001, and a certificate of readiness for hearing was filed on May 10. The matter was set for trial on November 13. The referee's report was then filed on November 26, which recommended that the increase go into effect on November 1, 2001. A hearing was held before the district court on January 15, 2002, and the court's order was filed on March 13.

The State argues that Dewitt has benefited from delays in the proceedings and that the district court abused its discretion in ordering the child support modification to become effective on November 1, 2001. The court adopted the referee's recommendation concerning the effective date of the modification. The referee found that it was inequitable to make Dewitt wholly responsible for the delay in the support determination by awarding the support retroactively.

[5,6] Absent equities to the contrary, the modification of child support orders should be applied retroactively to the first day of the month following the filing date of the application for modification. See *Peter v. Peter*, 262 Neb. 1017, 637 N.W.2d 865 (2002). In a modification of child support proceeding, the child and custodial parent should not be penalized, if it can be avoided, by the delay inherent in our legal system. *Riggs v. Riggs*, 261 Neb. 344, 622 N.W.2d 861 (2001). In *Riggs*, we reiterated that the initial determination as to the retroactive application of the modification is entrusted to the discretion of the trial court. We recognized that in some cases, a noncustodial parent may not be able to pay retroactive support and meet current obligations.

In the present case, the delays do not appear to be the fault of any one individual. We conclude that the district court's determination to make the increase retroactive to the first day of the month of the hearing before the referee, or November 1, 2001, was not an abuse of discretion, and we therefore affirm that portion of the court's judgment.

CONCLUSION

For the reasons set forth herein, we reverse the district court's judgment as to modification of Dewitt's child support obligation, and we remand the cause for a redetermination of such obligation. However, we affirm the remainder of the court's judgment, including that portion establishing November 1, 2001, as the effective date of the modification.

AFFIRMED IN PART, AND IN PART REVERSED
AND REMANDED WITH DIRECTIONS.

BERNARD J. MORELLO, APPELLANT, v. LAND REUTILIZATION
COMMISSION OF THE COUNTY OF DOUGLAS, NEBRASKA,
DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLEE,
AND DOUGLAS COUNTY, NEBRASKA, A POLITICAL
SUBDIVISION, THIRD-PARTY DEFENDANT, APPELLEE.

659 N.W.2d 310

Filed April 11, 2003. No. S-02-478.

1. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
2. **Statutes.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed.

W. Craig Howell, of Howell & Wilson, P.C., L.L.O., for appellant.

William T. Ginsburg for appellee Land Reutilization Commission.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, McCORMACK, and MILLER-LEMAN, JJ.

PER CURIAM.

NATURE OF CASE

Bernard J. Morello purchased real estate from the Land Reutilization Commission of the County of Douglas, Nebraska

(LRC). Subsequently, the City of Omaha (City) condemned the property purchased by Morello, and it was ultimately determined that Douglas County (County) owned the property in question, not Morello. Morello commenced this action against the LRC for damages and other relief. The district court granted summary judgment in favor of the LRC, and Morello appeals.

SCOPE OF REVIEW

[1] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Nauenburg v. Lewis*, ante p. 89, 655 N.W.2d 19 (2003).

FACTS

A more detailed statement of the facts surrounding this case is set forth in *City of Omaha v. Morello*, 257 Neb. 869, 602 N.W.2d 1 (1999). We set forth only those facts which are relevant to this appeal.

On June 10, 1988, the County initiated a tax foreclosure action against Father Flanagan's Boys' Home (Boys Home) for delinquent taxes on property owned by the Boys Home. Numerous parcels of real estate, including the tracts in question (24A and 24B), were offered for sale by the Douglas County treasurer, but were not sold and were subject to foreclosure. On October 24, the Boys Home executed and delivered to the County a quitclaim deed regarding tracts 24A and 24B.

On November 10, 1988, the district court for Douglas County entered a decree of foreclosure which included tracts 24A and 24B because the County had failed to remove the tracts from the foreclosure proceeding. The County recorded its quitclaim deed from the Boys Home on April 19, 1989. On June 20, the district court was requested to enter an order for a sheriff's sale of tracts 24A and 24B. The property was then sold to the LRC on July 26. On September 12, 1991, an order confirming the sale was entered, and subsequently, a sheriff's deed was delivered to the LRC. The LRC then sold the property to Morello and delivered to him a special warranty deed on October 30.

On July 23, 1996, the City filed an action seeking to condemn the interests of both the County and Morello. The final report of

the appraisers awarded \$56,500 for tract 24A and \$3,500 for tract 24B. The City appealed to the district court, alleging that the award was excessive. Morello filed an answer and counterclaim, and the County filed an answer and cross-appeal. On June 11, 1998, the district court entered a partial summary judgment in favor of the County, finding that the County remained the titleholder of the tracts in question. We affirmed. See *id.* We concluded, inter alia, that the property was erroneously sold at the foreclosure sale and that since the property was owned by the County, the transfer to the LRC under the foreclosure sale was void.

On March 10, 2000, Morello commenced this action against the LRC, alleging that he took title to the property in reliance upon the special warranty deed issued by the LRC. He claimed that once he became involved in litigation with the City and the County, the special warranty deed obligated the LRC to defend him. Morello sought recovery of the value of his investment, which he claimed was not less than \$225,000. In the alternative, Morello claimed that the LRC was liable for the purchase price of the real estate, interest, and a subsequent increase in value, for a total of \$230,000.

The district court granted the LRC's motion for summary judgment. It concluded that under the special warranty deed, the LRC was not obligated to defend Morello in the condemnation proceedings because the defect in title arose under or due to the actions of a prior owner of the property. Morello timely appealed.

ASSIGNMENT OF ERROR

Morello asserts that the district court erred in sustaining the LRC's motion for summary judgment.

ANALYSIS

The LRC was created by the Land Reutilization Act, Neb. Rev. Stat. § 77-3201 et seq. (Reissue 1990). It is a public corporation acting in a governmental capacity and is a political subdivision of the State of Nebraska. It is clothed with the authority necessary for the effective management, sale, transfer, and other disposition of real estate acquired under and by virtue of the foreclosure of a lien for delinquent real estate taxes. See § 77-3201. The LRC is

charged with fostering the public purpose of returning land which is in a non-revenue-generating, non-tax-producing status to effective utilization in order to provide housing, new industry, and jobs for the citizens of the county and new tax revenue for such county. *Id.*

If at a tax foreclosure sale, there is no bid equal to the full amount of the tax bills included in the judgment, interest, penalties, fees, and costs, then the LRC is deemed to have bid the full amount of all the tax bills included. See § 77-3211(1). If there are no other bids received by the sheriff in excess of that amount, then the bid of the LRC is accepted. *Id.*

After the LRC has obtained title to real estate, it has the option of either selling the real estate through a bidding process or transferring it to a governmental agency for public use. It has the authority to convey title to the real estate by either general or special warranty deed. See § 77-3205(2).

Tracts 24A and 24B were acquired by the LRC through a foreclosure sale for a bid of \$206.62. After the sale was confirmed, a sheriff's deed to the property was delivered to the LRC pursuant to § 77-3205(2). The LRC then conveyed the property to Morello by special warranty deed. The deed provided in part:

LAND REUTILIZATION COMMISSION OF THE COUNTY OF DOUGLAS, NEBRASKA ("Grantor"), in consideration of the sum of FIVE HUNDRED AND NO/100 . . . DOLLARS, in hand paid by BERNARD J. MORELLO . . . does hereby specially Grant, Bargain, Sell and Convey unto the said Grantee the following described premises . . .

[S]aid Grantor hereby specially covenants that said premises are free and clear of all liens and encumbrances . . . and it does hereby covenant to **SPECIALLY WARRANT AND DEFEND** the said premises against the lawful claims and demands of all persons claiming by, through, or under it, and against no other claims or demand.

Morello claims the special warranty deed to tracts 24A and 24B obligated the LRC to defend him in the condemnation proceedings brought by the City. In support of his assignment of error, Morello argues that the district court's ruling misplaced the statutory role of the LRC and the intent of an LRC special

warranty deed. Morello claims that the district court, by doing so, created a de facto quitclaim deed contrary to the statutory authority granted to the LRC.

Morello argues that if the LRC is required to defend only against defects that occur during the time the LRC held the title, such a construction would make the deed a quitclaim deed in substance, even though it might be a special warranty deed in form. He argues that the district court's construction of the deed rendered it a quitclaim deed and that, therefore, the court erred because § 77-3205 does not permit the LRC to convey property by quitclaim deed.

Morello contends that the Legislature intended the special warranty deed to warrant against defects that occur not only during the time that the LRC holds title to property but also during the time that the County holds title. He claims that the law does not allow the LRC to limit its liability to the interest it possesses as the grantor and that in order for a special warranty deed to have meaning, it must go beyond the LRC's interest as a grantor and contemplate defects created by the County. Morello also asserts that the statutory process in which the LRC was created does not involve an arms-length transaction and merely provides a default mechanism whereby the County deeds the land to another governmental entity that serves to dispose of the land.

The LRC and the County are not one. As a political subdivision of the State of Nebraska, the LRC is a separate and distinct entity from the County. Although it is the function of the LRC to dispose of tax-delinquent real estate and part of the purpose for such disposal is to create new tax revenue for the County, the LRC is a separate body. See § 77-3201.

The legal issue is whether a special warranty deed as referred to in § 77-3205(2) warrants the title to real estate against title defects that occur after the County obtains the title or after the LRC obtains the title through a foreclosure sale. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Nauenburg v. Lewis*, ante p. 89, 655 N.W.2d 19 (2003). In our examination of the special warranty deed, we find nothing which suggests that it was intended to be a quitclaim

deed, and Morello has not demonstrated that the deed was intended to warrant against defects occurring before the LRC secured title to the property.

[2] We have not previously considered the definition of a special warranty deed, and it has not been defined by the Legislature. In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning. *Henderson v. Henderson*, 264 Neb. 916, 653 N.W.2d 226 (2002). Thus, it is apparent that a special warranty deed, as referred to in § 77-3205, is a different instrument from a general warranty deed. In order to determine the manner in which the two instruments differ, we have consulted the following authorities:

In 11 Thompson on Real Property § 94.07(b)(2)(i) at 390 (David A. Thomas 2d ed. 2002), it is stated in part:

The covenants in grant deeds are more or less the same as those contained in special warranty deeds. Grantors of special warranty deeds and grant deeds do not promise that they are the true owner of the property or that they will protect the grantees against all claims of superior or paramount title. They only promise that no title defects have arisen or will arise due to the acts or omissions of the grantor. They promise that no one claiming by, through, or under the grantor will be able to assert a title superior to the covenantee's title.

(Emphasis omitted.) "If, in the deed, the grantor assures the grantee that there are no defects in the title whatsoever, no matter how, when, or by whom they may arise, the deed is known as a general or full warranty deed." 14 Richard R. Powell & Michael Allan Wolf, Powell on Real Property § 81A.03[1][b][ii] at 81A-28 (2000). See, also, *Rosenblum v. Eisenhower*, 29 Conn. Supp. 216, 280 A.2d 537 (1971).

A deed in which covenants are limited to defects which arise by, through, or under the actions of the grantor is known as a special warranty deed. Under this limited form of warranty, recovery is available only if the defect arises because of the acts of the grantor. In such a case, if the defect is based on events which occurred while the property was in the hands of a prior titleholder, then the grantee will have to look to the covenants, if any, contained in the

deed from a prior titleholder, and cannot recover against the immediate grantor.

14 Powell & Wolf, *supra*, § 81A.03[1][b][iii] at 81A-28.

The Nebraska Real Estate Practice Manual provides in part:

In a special warranty deed, the grantor agrees that grantor and grantor's heirs will warrant and guarantee the title to the property to the grantee and the grantee's heirs and assigns against all persons claiming by, through, or under the grantor or grantor's heirs. But unlike a general warranty deed, grantor does not warrant against defects in the title that existed before grantor was deeded the property.

Jeffery T. Peetz, Deeds, in Nebraska Real Estate Practice Manual, ch. 13, § 2(c) at 13-2 (Neb. Cont. Legal Educ., 1995). Thus, a special warranty deed is distinguishable from a general warranty deed in that the grantor of a special warranty deed "does not warrant against defects in the title that existed before grantor was deeded the property." See *id.*

It is also clear that a special warranty deed is not a quitclaim deed. In *Gustafson v. Gustafson*, 239 Neb. 448, 451, 476 N.W.2d 819, 821 (1991), we stated: "A quitclaim deed by its nature is an instrument of transfer whereby the grantor transfers only the interest the grantor has in the property at the time of the conveyance." In 14 Powell & Wolf, *supra*, § 81A.03[1][c] at 81A-29, a quitclaim deed is described in the following manner:

Under a quitclaim deed, the grantor does not purport to "convey" the property to the grantee. Rather the grantor "quitclaims all right, title and interest the grantor may have in the property, if any," to the grantee. It is this language which distinguishes a quitclaim deed from all other deed forms. Under this form of deed, the grantor transfers only what interest he or she may have in the property at the time of conveyance. The grantor makes no assurance to the grantee that he or she actually has good title to, or even any interest at all in, the property and, accordingly, makes no covenants of title. The use of a quitclaim deed can be regarded as notice to the purchaser that there may be outstanding equities against the grantor's title, and can thus cause the purchaser to be denied the benefit of bona fide purchaser status.

Since tracts 24A and 24B were conveyed by a special warranty deed, the LRC did not warrant that it was the true owner of the property. It only warranted that no title defects had arisen or would arise due to the acts or omissions of the LRC. Pursuant to a special warranty deed, recovery is available only if the defects arose because of the acts of the grantor. If a defect is based on events which occurred while the property was in the hands of a prior titleholder, then the grantee cannot recover against the immediate grantor. See 14 Powell & Wolf, *supra*, § 81A.03[1][b][iii].

It is undisputed that the defect in the title to tracts 24A and 24B was not based on events which occurred while the property was in the hands of the LRC. Therefore, the LRC was not required to defend Morello against the defects that occurred prior to the time the LRC obtained title to the property.

CONCLUSION

The LRC conveyed property to Morello by special warranty deed and therefore was not required to defend Morello in litigation with the City and the County because any defects in the title occurred prior to the time the property was conveyed to the LRC. The district court did not err in granting summary judgment in favor of the LRC. We therefore affirm the judgment of the district court.

AFFIRMED.

FLOYDENE WILDER, APPELLEE, v. GRANT COUNTY SCHOOL
DISTRICT No. 0001, A POLITICAL SUBDIVISION OF THE
STATE OF NEBRASKA, ALSO KNOWN AS HYANNIS
ELEMENTARY SCHOOL, APPELLANT.
658 N.W.2d 923

Filed April 11, 2003. No. S-02-579.

1. **Schools and School Districts: Termination of Employment: Teacher Contracts: Evidence: Appeal and Error.** The standard of review in a proceeding in error from an order of a school board terminating the contract of a tenured teacher is whether the school board acted within its jurisdiction and whether there is sufficient evidence as a matter of law to support its decision.

2. **Statutes: Appeal and Error.** Where the requirements of the statute at issue are a question of law, the appellate court reaches its conclusion independent of the trial court's decision.
3. **Statutes: Legislature: Intent.** In discerning the meaning of a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
4. ____: ____: _____. It is the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself.
5. **Statutes.** A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless; it is not within the province of a court to read anything plain, direct, and unambiguous out of a statute.

Appeal from the District Court for Grant County: BRIAN SILVERMAN, Judge. Affirmed.

John P. Weis for appellant.

Scott J. Norby, of McGuire and Norby, for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

Floydene Wilder filed a petition in error in the district court for Grant County to obtain review of the decision of the school board for Grant County School District No. 0001 which terminated Wilder's employment due to a reduction in force. The district court reversed the school board's decision and ordered Wilder reinstated. The school district appeals. We affirm the decision of the district court.

STATEMENT OF FACTS

There is no dispute with regard to the material facts. The appellant, a Class I school district, is a political subdivision providing education to children from kindergarten through the sixth grade. Wilder is a permanent certificated teacher and had been employed by the school district, full time, for 16 years. Prior to her full-time employment, Wilder had worked for the school district, at half-time employment, for 3 years.

During the 2000-2001 school year, the school district served 22 students and employed Wilder and two other full-time teachers.

All three teachers held elementary endorsements. Of the three teachers, Wilder had the fewest years of service, with one teacher having 23 years of service and the other having 18 years of service. Wilder was the only teacher among the three who held an additional endorsement as a "Level 7" library media specialist.

On April 10, 2001, Wilder received a letter indicating that the school district was considering not renewing her teaching contract, due to a reduction in force. The letter stated that termination of Wilder's contract was being considered because Wilder had "the least amount of tenure among the certified staff." In a letter dated April 12, 2001, Wilder requested a hearing before the school board regarding the proposed reduction in force.

A hearing was held on May 15, 2001. At the hearing, the school district's secretary provided information regarding the school district's declining student enrollment. According to the secretary, the school district had 22 students enrolled during the 2000-2001 school year, and it was expected that enrollment would decline to 11 students during the 2001-02 school year. Lou Schoff, who was under contract with the school district to provide administrative services, testified about the reduction of the school district budget for the 2001-02 school year. Schoff stated that he had been asked by the school district to make a recommendation regarding the reduction in force, utilizing only the service records of the three teachers to formulate his recommendation. Schoff testified that he had recommended to the school district to terminate Wilder's employment, based solely on Wilder's having the fewest years of service.

During the hearing before the school board, the school district introduced into the record a copy of the school district's "reduction in force policy." The school district's policy provides as follows:

6.8 Reduction in Force

When the Board of Education deems that program changes, budget limitations or other changes in circumstances require a reduction in force, then the board will notify the teacher or teachers that staff reduction procedures are being considered.

In considering staff reduction, normal attrition of personnel through resignation, retirement, termination,

cancellation, non-renewal, death, etc., shall be taken into consideration by the board.

The procedures used to notify teachers of reduction in force shall be the same as prescribed by statute for all other termination or non-renewal of contract.

Any teacher who is terminated because of reduction in force shall have preferred rights to employment for a period of 24 months commencing at the end of the contract year. The recall of such teacher shall be based on length of service in the district. The teacher shall upon reappointment retain any benefits which have accrued to said teacher prior to termination; however, the leave of absence shall not count as a year of employment unless it meets the statutory definition.

Wilder did not testify or present evidence during the hearing before the school board.

At the conclusion of the hearing, the school board voted unanimously to terminate Wilder's contract due to a "change in circumstances, specifically that there has been a reduction in the enrollment of the elementary school students and also a reduction in the elementary school budget, and that these changes in circumstances necessitates [sic] a reduction in force." The school board indicated that Wilder's contract would be terminated "due to the fact that she ha[d] the least amount of service time among the certified staff of the elementary school."

Wilder appealed the school board's decision to terminate her contract to the district court. Following a hearing, the district court reversed the decision of the school board, concluding that the decision violated Neb. Rev. Stat. § 79-846 (Reissue 1996), because the school district's reduction in force policy contained no "criteria" by which to determine the basis for the reduction in force. Section 79-846 provides as follows:

Prior to January 1, 1979, every school board, board of education, or governing board of any educational institution in Nebraska covered by the provisions of sections 79-824 to 79-842 shall adopt a reduction-in-force policy covering employees subject to such statutory provisions to carry out the intent of sections 79-846 to 79-849. No such policy shall allow the reduction of a permanent or tenured

employee while a probationary employee is retained to render a service which such permanent employee is qualified by reason of certification and endorsement to perform or, in cases in which certification is not applicable, by reason of college credits in the teaching area. If employee evaluation is to be included as a criterion to be used for reduction in force, specific criteria such as frequency of evaluation, evaluation forms, and number and length of classroom observations shall be included as part of the reduction-in-force policy.

Due to the absence of any criteria in the school district's reduction in force policy, the district court determined that the school district's termination of Wilder's contract was arbitrary. The district court also determined that contrary to Neb. Rev. Stat. § 79-847 (Reissue 1996), the school district had failed to establish that the change in circumstances necessitating the reduction in force specifically related to Wilder. Section 79-847 provides:

Before a reduction in force occurs, the school board or board of education and the school district administration shall present competent evidence demonstrating that a change in circumstances has occurred necessitating a reduction in force. Any alleged change in circumstances must be specifically related to the teacher or teachers to be reduced in force, and the board, based upon evidence produced at the hearing required by sections 79-824 to 79-842, shall be required to specifically find that there are no other vacancies on the staff for which the employee to be reduced is qualified by endorsement or professional training to perform.

The district court ordered the school district to reinstate Wilder's contract of employment. The school district appeals.

ASSIGNMENT OF ERROR

On appeal, the school district assigns three errors, which we restate as one. The school district claims, restated, that the district court erred in determining that the school district's termination of Wilder's contract as a result of a reduction in force was arbitrary and not based upon a change in circumstances specifically related to Wilder.

STANDARDS OF REVIEW

[1] The standard of review in a proceeding in error from an order of a school board terminating the contract of a tenured teacher is whether the school board acted within its jurisdiction and whether there is sufficient evidence as a matter of law to support its decision. *McQuinn v. Douglas Cty. Sch. Dist. No. 66*, 259 Neb. 720, 612 N.W.2d 198 (2000); *Nickel v. Saline Cty. Sch. Dist. No. 163*, 251 Neb. 762, 559 N.W.2d 480 (1997). The evidence is sufficient as a matter of law if the school board could reasonably find the facts as it did on the basis of the testimony and exhibits contained in the record before it. *Id.* Stated another way, the evidence is considered sufficient as a matter of law, or is ““substantial”” or constitutes ““some competent evidence,”” as those terms have been used in prior articulations of the standard of review in these cases, “‘if a judge could not, were the trial to a jury, direct a verdict.’” *Boss v. Fillmore Cty. Sch. Dist. No. 19*, 251 Neb. 669, 676, 559 N.W.2d 448, 453 (1997) (quoting *Eshom v. Board of Ed. of Sch. Dist. No. 54*, 219 Neb. 467, 364 N.W.2d 7 (1985)).

ANALYSIS

On appeal, the school district challenges the district court’s decision ordering Wilder’s reinstatement. The district court reasoned that the termination of Wilder’s contract pursuant to the school district’s reduction in force policy was arbitrary, because the policy contained no criteria by which a reduction in force decision could be made. Given the statutes and the facts of this case, we affirm the district court’s decision.

[2] We have previously observed that, by statute, “the Legislature has attenuated a school [district’s] discretion to pare its staff in the face of reduced needs and has imposed specified procedures for achieving a reduction in force.” *Trolson v. Board of Ed. of Sch. Dist. of Blair*, 229 Neb. 37, 38-39, 424 N.W.2d 881, 882 (1988). One such procedure is that the school district must adopt a reduction in force policy. See § 79-846. At issue in this appeal is whether the policy adopted by the school district is an adequate reduction in force policy under § 79-846. Because our interpretation of the requirements of the statute at issue is a question of law, we reach our conclusion in that respect independent

of the trial court's decision. *Jacobson v. Solid Waste Agency of Northwest Neb.*, 264 Neb. 961, 653 N.W.2d 482 (2002). See, similarly, *Ackerman v. Metropolitan Community College*, 6 Neb. App. 536, 575 N.W.2d 181 (1998) (stating that whether college reduction in force was in compliance with statute is question of law).

[3-5] In discerning the meaning of a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *Kosmicki v. State*, 264 Neb. 887, 652 N.W.2d 883 (2002). It is the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself. *Id.*; *Capitol City Telephone v. Nebraska Dept. of Rev.*, 264 Neb. 515, 650 N.W.2d 467 (2002). A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless; it is not within the province of a court to read anything plain, direct, and unambiguous out of a statute. *Volquardson v. Hartford Ins. Co.*, 264 Neb. 337, 647 N.W.2d 599 (2002).

As stated above, pursuant to § 79-846, "every school board, board of education, or governing board of any educational institution in Nebraska covered by the provisions of sections 79-824 to 79-842 shall adopt a reduction-in-force policy covering employees subject to such statutory provisions." Elsewhere, § 79-846 provides that "[i]f employee evaluation is to be included as a criterion to be used for reduction in force," various forms and procedures "shall be included as part of the reduction-in-force policy." The reference in § 79-846 to employee evaluation as one "criterion" indicates that the Legislature intended that a reduction in force policy should contain criteria by which a reduction in force decision would be made. The use of the word "criterion" in § 79-846 is neither superfluous nor meaningless. *Volquardson, supra*. We therefore conclude that a reduction in force policy adopted pursuant to § 79-846 must contain criteria on which the reduction in force decision will be made.

In the instant case, the school district's reduction in force policy that was included as an exhibit in the record does not identify any criteria by which a reduction in force decision would be made. Although we have said that "a school board has broad discretion in determining what factors to include in its reduction in

force policy as well as how to weigh those factors,” *Nickel v. Saline Cty. Sch. Dist. No. 163*, 251 Neb. 762, 771, 559 N.W.2d 480, 486 (1997), we have not and do not endorse a policy with no factors. Accordingly, as a matter of law, the school district’s policy does not comport with the requirements of § 79-846.

The proceedings in this case show that Wilder’s contract with the school district was terminated because she had “the least amount of service time among the certified staff.” Although the April 10, 2001, letter from the school district advised Wilder that years of service would be considered when the district made its reduction in force decision, that letter is no substitute for a proper policy under the statute, the adoption of which policy should ante-date the changes necessitating the reduction in force. Because the school district’s policy contained no criteria on which to base a reduction in force decision, there is no evidence to show that the school board’s reduction in force decision was in accordance with that policy. Thus, the evidence does not meet the requirement under § 79-847 that the evidence produced at the hearing establish that, among other things, the change in circumstances necessitating a reduction in force specifically relate to Wilder. See *Trolson v. Board of Ed. of Sch. Dist. of Blair*, 229 Neb. 37, 424 N.W.2d 881 (1988). The district court correctly reversed the decision of the school board.

CONCLUSION

The standard of review of a proceeding in error taken from an order of a school board terminating the contract of a tenured teacher is whether the school board acted within its jurisdiction and whether there is sufficient evidence as a matter of law to support its decision. *McQuinn v. Douglas Cty. Sch. Dist. No. 66*, 259 Neb. 720, 612 N.W.2d 198 (2000); *Nickel, supra*. In this case, the reduction in force policy was flawed and the evidence is not sufficient as a matter of law to support the school board’s decision to terminate Wilder’s contract due to a reduction in force. Accordingly, we affirm the decision of the district court which ordered Wilder reinstated.

AFFIRMED.

MARION BENNETT, APPELLANT, V. JOHN LABENZ ET AL.,
DEFENDANTS AND THIRD-PARTY PLAINTIFFS, APPELLEES, AND
BOARD OF REGENTS, DOING BUSINESS AS UNIVERSITY OF
NEBRASKA MEDICAL CENTER, AN AGENCY OF THE STATE,
THIRD-PARTY DEFENDANT, APPELLEE.
659 N.W.2d 339

Filed April 18, 2003. No. S-01-1101.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Negligence: Words and Phrases.** Gross negligence is great or excessive negligence, which indicates the absence of even slight care in the performance of a duty.
4. **Negligence.** Whether gross negligence exists must be ascertained from the facts and circumstances of each particular case and not from any fixed definition or rule.

Petition for further review from the Nebraska Court of Appeals, HANNON, INBODY, and CARLSON, Judges, on appeal thereto from the District Court for Douglas County, J. PATRICK MULLEN, Judge. Judgment of Court of Appeals affirmed in part and in part reversed, and cause remanded with directions.

Joseph B. Muller, of Law Offices of Ronald J. Palagi, P.C., for appellant.

Michelle Peters, Assistant Omaha City Attorney, for appellee John Labenz et al.

David L. Welch, of Gaines, Pansing & Hogan, for appellee Board of Regents.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

Marion Bennett filed a negligence action against John Labenz, Matt Harden, and the City of Omaha (collectively the Defendants)

seeking damages for injuries she sustained while being transported by Labenz and Harden, two Omaha firefighter-paramedics. The Defendants filed a third-party action against the Board of Regents, doing business as the University of Nebraska Medical Center (UNMC). After concluding that the Defendants' alleged negligence did not amount to gross negligence, the district court for Douglas County granted the Defendants' motion for summary judgment and dismissed the petition. Bennett appealed to the Nebraska Court of Appeals, and the Court of Appeals concluded, *inter alia*, that the district court erred in determining as a matter of law that Labenz and Harden were not grossly negligent. *Bennett v. Labenz*, No. A-01-1101, 2002 WL 31548926 (Neb. App. Nov. 19, 2002) (not designated for permanent publication). The Court of Appeals reversed in part the grant of summary judgment in the Defendants' favor and remanded the cause. The Defendants petitioned this court for further review of certain aspects of the decision of the Court of Appeals. We granted the petition. We affirm in part, and in part reverse and remand with directions.

STATEMENT OF FACTS

On April 28, 1997, Labenz and Harden responded to a 911 emergency dispatch service call at Bennett's home. Bennett had fallen and injured her leg. Labenz and Harden assessed her condition and placed her on a stretcher for transport to UNMC. Labenz and Harden strapped Bennett onto the stretcher. They encountered no problems getting Bennett into the ambulance and transporting her to UNMC.

On April 28, 1997, the main emergency entrance at UNMC was under construction, and UNMC had set up a temporary emergency entrance. The record shows that there had been no reports of dangerous conditions surrounding the temporary emergency entrance. Harden testified that he had not noticed any cracks in the cement that would cause concern. The temporary entrance was on an incline. Labenz and Harden were familiar with the temporary entrance and the incline.

Upon arriving at UNMC, Harden grabbed the end of the stretcher and pushed the release lever, which released the stretcher so he could roll it out of the ambulance to the point where the safety bar catches a hook that is located on the back of

the ambulance, thus preventing the stretcher from rolling out. Harden dropped the legs of the stretcher down and locked them into place. Labenz then lifted the safety bar over the hook. Both Labenz and Harden rolled the stretcher out of the ambulance. While moving the stretcher toward the emergency room entrance, a wheel of the stretcher became caught in a crack in the cement of the hospital driveway, causing the stretcher to tip over and Bennett to fall. Bennett broke her left shoulder as a result of the fall.

David McClard, a "triage tech" at UNMC, witnessed the incident. According to McClard, the stretcher tipped over after it became caught in a crack in the cement. He stated that only one of the firefighter-paramedics was moving the stretcher at the time of the incident.

Bennett filed a negligence action against the Defendants. The Defendants filed a third-party petition against UNMC as a third-party defendant, alleging UNMC was negligent in failing to maintain the driveway at the temporary emergency entrance. In the Defendants' answer to Bennett's petition, they alleged immunity pursuant to Neb. Rev. Stat. § 71-5111 (Reissue 1996). Section 71-5111 provided immunity from civil liability for certain emergency and ambulance workers, but further provided that such immunity should not apply to "any person causing damage or injury by his or her willful, wanton, or grossly negligent act of commission or omission." We note that § 71-5111 has been repealed and replaced by Neb. Rev. Stat. § 71-5194 (Cum. Supp. 2002). However, the operative date of the repeal was July 1, 1998, which was subsequent to the April 28, 1997, incident involved in this case, and, therefore, § 71-5111 is applicable to this case.

Bennett filed a second amended petition on April 9, 2001, in which she alleged that Labenz and Harden were willfully, wantonly, or grossly negligent and that their negligence resulted in her injury. Generally, Bennett alleged that Labenz and Harden were negligent in moving the stretcher without adequate assistance, moving the stretcher while it was in the fully extended position, failing to note the condition of the driveway, and failing to take proper precautions in light of the condition of the driveway. Bennett claimed that the City of Omaha was liable as a result of the acts of Labenz and Harden. Bennett further alleged that the

City of Omaha was negligent for failing to train and instruct Labenz and Harden on the proper operation of the stretcher.

On May 8, 2001, the Defendants filed a motion for summary judgment, asserting that they were immune from civil liability pursuant to § 71-5111. In Bennett's response to the motion for summary judgment, she requested that the court overrule the motion or, in the alternative, continue the motion and grant her additional time to conduct discovery. The motion came on for hearing, and on September 5, the district court entered an order sustaining the motion and dismissing the case with prejudice. The court concluded that the allegations of negligence on the part of Labenz and Harden did not amount to gross negligence and that no reasonable person could conclude that they had acted without slight care. The court further concluded that the immunity provided under § 71-5111 applied to the City of Omaha as the employer of Labenz and Harden, that the City of Omaha could not be held liable for the actions of Labenz and Harden which were not grossly negligent, and that the allegations of direct negligence on the part of the City of Omaha in failing to train and instruct did not amount to gross negligence.

Bennett appealed to the Court of Appeals. On appeal, Bennett asserted, *inter alia*, that the district court erred in determining that Labenz and Harden were not grossly negligent and in determining that § 71-5111 granted immunity to the City of Omaha for its own direct negligence. The Court of Appeals reviewed the record and noted, *inter alia*, that there was a conflict in the evidence regarding whether only one or both of the firefighter-paramedics had their hands on the stretcher when it tipped over and whether the use of the stretcher comported with the operating manual for the stretcher. The Court of Appeals concluded that viewing the evidence in the light most favorable to Bennett and giving her the benefit of all reasonable inferences deducible from the evidence, the district court erred in determining as a matter of law that Labenz and Harden were not grossly negligent.

With regard to the alleged direct acts of negligence of the City of Omaha, the Court of Appeals concluded that the district court erred in holding that § 71-5111 provided immunity to the City of Omaha for its own negligence. The Court of Appeals stated that the immunity provided under § 71-5111 extended to the City of

Omaha only so far as it might be liable based on respondeat superior for the acts or omissions of Labenz and Harden, but that the statute did not grant immunity to the City of Omaha for its own alleged negligence in failing to properly train Labenz and Harden.

The Court of Appeals therefore reversed in part the grant of summary judgment in the Defendants' favor and remanded the cause. The Defendants petitioned this court for further review of the Court of Appeals' decision, and we granted their petition.

ASSIGNMENT OF ERROR

The Defendants assert on further review that the Court of Appeals erred in reversing the district court's ruling in which the district court had determined that Labenz and Harden were not grossly negligent and had entered summary judgment in their favor. Further review has not been sought regarding the conclusion of the Court of Appeals that § 71-5111 did not provide immunity for the City of Omaha for its own alleged acts of negligence and that the decision should be reversed in part and the cause remanded as to the City of Omaha's direct negligence.

STANDARDS OF REVIEW

[1,2] Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *In re Estate of Pfeiffer*, ante p. 498, 658 N.W.2d 14 (2003). In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

ANALYSIS

Upon review of pleadings and evidence in connection with Defendants' motion for summary judgment, the district court in the present case determined that "[n]o reasonable person could conclude that defendants Labenz and Harden acted without slight care" and that therefore Bennett's allegations of negligence on the part of Labenz and Harden did not amount to gross negligence. On appeal, the Court of Appeals noted evidence indicating that

Labenz and Harden might not have employed certain indicated techniques while moving the stretcher toward the temporary emergency entrance and therefore concluded that the district court erred in determining that Labenz and Harden were not grossly negligent. On further review, the Defendants argue that even if Labenz and Harden failed to follow certain indicated procedures, such failure cannot establish that they acted without even slight care and therefore cannot be viewed as gross negligence. We agree with the Defendants' argument as well as the district court's conclusion that given the undisputed facts, Bennett cannot establish gross negligence on the part of Labenz and Harden.

[3,4] Gross negligence is great or excessive negligence, which indicates the absence of even slight care in the performance of a duty. *Drake v. Drake*, 260 Neb 530, 618 N.W.2d 650 (2000). Whether gross negligence exists must be ascertained from the facts and circumstances of each particular case and not from any fixed definition or rule. *Wicker v. City of Ord*, 233 Neb. 705, 447 N.W.2d 628 (1989). The issue of gross negligence is susceptible to resolution in a motion for summary judgment. See *id.* Depending on the facts, we have observed that negligence that is momentary in nature generally does not constitute gross negligence. *Branch v. Wilkinson*, 198 Neb. 649, 256 N.W.2d 307 (1977).

In the present case, Bennett alleged that Labenz and Harden failed to take certain actions which might have prevented the incident. In this regard, Bennett points to the testimony of McClard who, contrary to Harden's recollection, testified that only one of the firefighter-paramedics had his hands on the stretcher at the time it hit the crack and tipped over.

Although Bennett's evidence might support a conclusion that Labenz and Harden were negligent to some degree, in order to establish gross negligence and be recoverable under § 71-5111, Bennett needed to show an absence of even slight care by Labenz and Harden. Further, even taking the inferences from the evidence in favor of Bennett, the pleadings and evidence do not indicate great or excessive negligence. Harden provided undisputed testimony that he and Labenz took certain precautions recited in the facts section above in transporting Bennett, in removing her from the ambulance, and in using the stretcher. In

this connection, Labenz testified that although he was aware of the incline of the entrance, he was not aware of the crack in the pavement. In light of the undisputed testimony that Labenz and Harden took certain precautions, Bennett's allegations that they failed to take other additional precautions does not establish "the absence of even slight care" required to constitute gross negligence. See *Drake v. Drake*, 260 Neb. at 543, 618 N.W.2d at 661. Based on the evidence as to the actions of Labenz and Harden, we agree with the district court's conclusion that no reasonable person could find that Labenz and Harden acted without even slight care. The portion of the decision of the Court of Appeals which reversed the district court's decision on this issue was incorrect and is reversed.

CONCLUSION

We conclude that the district court did not err in determining that no reasonable person could find that Labenz' and Harden's actions constituted gross negligence. We therefore reverse that part of the Court of Appeals' opinion in which it reversed this determination of the district court. We remand this cause to the Court of Appeals with directions to affirm that portion of the district court's order which granted the Defendants' motion for summary judgment in favor of Labenz and Harden and dismissed the case as to Labenz and Harden and, with respect to the City of Omaha, granted the motion in favor of the City of Omaha only to the extent that the City of Omaha's alleged liability was based on respondeat superior.

We note that in addition to its holding regarding the alleged gross negligence of Labenz and Harden and the City of Omaha's alleged liability therefor, the Court of Appeals concluded that § 71-5111 did not provide immunity for the City of Omaha's own alleged negligence in failing to train and instruct Labenz and Harden. The Court of Appeals reversed the district court's dismissal of this claim and remanded the cause on the issue of the City of Omaha's own negligence. Because the Defendants did not assign error to this decision of the Court of Appeals, we do not comment on this portion of the decision of the Court of Appeals, and such ruling is unaffected by our decision. Therefore that portion of the Court of Appeals' decision is affirmed, and the

order remanding the cause to the district court on the issue of the City of Omaha's own negligence remains in effect.

AFFIRMED IN PART, AND IN PART REVERSED
AND REMANDED WITH DIRECTIONS.

STEPHAN, J., not participating.

CHRISTOPHER S. HAMILTON, APPELLANT, v. WAYNE NESTOR,
PERSONAL REPRESENTATIVE OF THE ESTATE OF
DIANN K. NESTOR, DECEASED, APPELLEE.

659 N.W.2d 321

Filed April 18, 2003. No. S-02-356.

1. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.
2. **Summary Judgment.** Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
4. **Actions: Mental Distress.** An emotional distress claim is not a cause of action, but, rather, a separate theory of recovery or element of damage.
5. **Mental Distress.** In order to be recoverable, emotional distress must have been so severe that no reasonable person could have been expected to endure it and that the emotional anguish or mental harm must be medically diagnosable and must be of sufficient severity that it is medically significant.

Appeal from the District Court for Gage County: PAUL W. KORSLUND, Judge. Affirmed.

John M. Lefler for appellant.

James M. Bausch, Tracy A. Oldemeyer, and Pamela K. Epp, of Cline, Williams, Wright, Johnson & Oldfather, P.C., for appellee.

CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

In this action arising from a motor vehicle accident, the district court for Gage County held as a matter of law that Christopher S. Hamilton could not recover on his negligence claim. The court reasoned that Hamilton suffered no physical injury in the accident and therefore could not recover damages for his emotional distress caused by the accident. Hamilton appeals from a denial of his motion for new trial.

FACTS

In Hamilton's operative amended petition filed against Wayne Nestor, the personal representative of the estate of DiAnn K. Nestor (Nestor), Hamilton alleged that on October 21, 1997, he was involved in a motor vehicle collision caused by Nestor's negligence. Both Nestor and her daughter Laura, who was a passenger in her vehicle, sustained fatal injuries. Hamilton alleged that as a proximate result of Nestor's negligence, he suffered "mental and psychological injuries, including posttraumatic stress disorder." He prayed for both general and special damages.

The personal representative moved for summary judgment. At a hearing on the motion, the personal representative offered portions of Hamilton's deposition in which he admitted that he banged his knees on the dashboard during the accident but otherwise suffered no physical injuries. In other portions of the deposition, Hamilton described recurrent nightmares in which he comes upon accident scenes and finds that he or his family members are the victims. These nightmares occur five to six times a week when he is not on medication and one to two times a week when he is medicated. Hamilton also described "flashbacks" that usually occur when he is driving, in which he sees all or part of the accident. Hamilton is generally fearful that he will be involved in another accident and feels guilty that he was unable to prevent the deaths of two people. He testified that he once blacked out while driving near the intersection where the accident occurred. Also received in evidence was the deposition testimony of Dr. Y. Scott Moore. Moore testified that Hamilton suffered posttraumatic stress disorder as a result of the accident.

The district court granted the personal representative's motion for summary judgment on January 10, 2002. In its order, the court

found that Hamilton did not suffer any physical injury in the accident. Relying on *Hartwig v. Oregon Trail Eye Clinic*, 254 Neb. 777, 580 N.W.2d 86 (1998), and *Baylor v. Tyrrell*, 177 Neb. 812, 131 N.W.2d 393 (1964), *disapproved on other grounds*, *Larsen v. First Bank*, 245 Neb. 950, 515 N.W.2d 804 (1994), the court determined that Nebraska law allows recovery for mental suffering and anxiety only in negligence actions in which a physical injury has been sustained. The court further noted that although Nebraska allows a cause of action for negligent infliction of emotional distress, “[t]his action is not one for negligent infliction of emotional distress, but rather [one that] alleges mental or emotional damages as a result of automobile negligence.”

Hamilton filed a motion for new trial in which he alleged that the trial court erred in granting the motion for summary judgment. Alternatively, Hamilton alleged that the trial court erred in failing to allow the case to proceed on the theory of negligent infliction of emotional distress or to grant Hamilton leave to amend his petition to specifically allege that theory. In an order overruling the motion, the district court held that Hamilton could not recover on a negligence cause of action because his mental suffering did not arise out of a physical injury and that he could not proceed on a negligent infliction of emotional distress theory as a matter of law because he had no marital or familial relationship with Nestor. Hamilton filed this timely appeal, and we granted his petition to bypass the Nebraska Court of Appeals.

ASSIGNMENTS OF ERROR

Hamilton assigns, restated and summarized, that the district court erred in (1) sustaining Nestor’s motion for summary judgment on the basis that posttraumatic stress disorder is not compensable under a general motor vehicle negligence claim and (2) denying his motion for new trial, thereby precluding him from proceeding on an alternate claim for negligent infliction of emotional distress.

STANDARD OF REVIEW

[1] A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an

abuse of that discretion. *Bradley T. & Donna T. v. Central Catholic High Sch.*, 264 Neb. 951, 653 N.W.2d 813 (2002); *Bowley v. W.S.A., Inc.*, 264 Neb. 6, 645 N.W.2d 512 (2002).

[2,3] Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. Neb. Rev. Stat. § 25-1332 (Cum. Supp. 2002); *Soukop v. ConAgra, Inc.*, 264 Neb. 1015, 653 N.W.2d 655 (2002); *Governor's Policy Research Office v. KN Energy*, 264 Neb. 924, 652 N.W.2d 865 (2002). In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *R.W. v. Schrein*, 264 Neb. 818, 652 N.W.2d 574 (2002); *Pinkard v. Confederation Life Ins. Co.*, 264 Neb. 312, 647 N.W.2d 85 (2002).

ANALYSIS

CHARACTERIZATION OF THIS ACTION

[4] We disagree with the district court's characterization of this action as "not one for negligent infliction of emotional distress, but rather [one that] alleges mental or emotional damages as a result of automobile negligence." We have stated that an "emotional distress claim is not a cause of action, but, rather, a separate theory of recovery or element of damage." *Fackler v. Genetzky*, 257 Neb. 130, 139, 595 N.W.2d 884, 891 (1999). This is a civil action for damages based upon allegations of negligent operation of a motor vehicle on a public highway. Hamilton makes no claim that the physical structure of his body was injured in the accident, and he therefore seeks no damages for mental pain and suffering related to a physical injury. Nor is this a case involving a claim for parasitic damages, which are damages occasioned by anxiety specifically due to a reasonable fear of future harm attributable to a physical injury caused by the negligence of another. See *Hartwig v. Oregon Trail Eye Clinic*, 254 Neb. 777, 580 N.W.2d 86 (1998). Rather, the injury claimed by Hamilton can be fairly described as "mental or emotional harm (such as fright or anxiety) that is caused by the negligence of

another and that is not directly brought about by a physical injury, but that may manifest itself in physical symptoms.” See *Consolidated Rail Corporation v. Gottshall*, 512 U.S. 532, 544, 114 S. Ct. 2396, 129 L. Ed. 2d 427 (1994). This is the only injury for which Hamilton claims damages in this action. Thus, while it is true that the negligence alleged in this case involved the operation of a motor vehicle, the injury which is claimed to have resulted from such negligence is purely an emotional one. This, then, is an action for negligent infliction of emotional distress.

In *Consolidated Rail Corporation v. Gottshall*, *supra*, the U.S. Supreme Court was presented with the issue of whether a purely emotional injury was compensable under the Federal Employers’ Liability Act, which permits railroad employees to recover for work injuries caused by an employer’s negligence. See 45 U.S.C. § 51 (2000). In addressing this issue, the Court acknowledged that while nearly all states have recognized a right to recover for negligent infliction of emotional distress, as defined by the Court in the passage quoted above, the “fundamental differences between emotional and physical injuries” has led to practical limitations upon the common-law right of recovery for reasons of public policy. *Consolidated Rail Corporation v. Gottshall*, 512 U.S. at 545. For example, the Court noted that

“[b]ecause the etiology of emotional disturbance is usually not as readily apparent as that of a broken bone following an automobile accident, courts have been concerned . . . that recognition of a cause of action for [emotional] injury when not related to any physical trauma may inundate judicial resources with a flood of relatively trivial claims, many of which may be imagined or falsified, and that liability may be imposed for highly remote consequences of a negligent act.”

512 U.S. at 545, quoting *Maloney v. Conroy*, 208 Conn. 392, 545 A.2d 1059 (1988). Other policy considerations noted by the Court as influencing limitations upon the right to recover damages for emotional distress include the absence, in comparison to physical injury, of “necessary finite limits on the number of persons who might suffer emotional injury as a result of a given negligent act,” and the difficulty of predicting the incidence and severity of emotional injuries which “depend on psychological

factors that ordinarily are not apparent to potential tortfeasors.” *Consolidated Rail Corporation v. Gottshall*, 512 U.S. at 545-46. The Court concluded:

For all of these reasons, courts have realized that recognition of a cause of action for negligent infliction of emotional distress holds out the very real possibility of nearly infinite and unpredictable liability for defendants. *Courts therefore have placed substantial limitations on the class of plaintiffs that may recover for emotional injuries and on the injuries that may be compensable.*

(Emphasis supplied.) 512 U.S. at 546.

NEGLIGENT INFLECTION OF EMOTIONAL DISTRESS IN NEBRASKA

This court addressed the relationship between emotional injury and physical injury in *Hanford v. Omaha & C. B. Street R. Co.*, 113 Neb. 423, 203 N.W. 643 (1925). In that case, a pregnant woman was approaching a streetcar she intended to board when a second streetcar crashed into the first. Although the woman suffered no direct physical injury from this collision, it caused her to jump backward and she suffered a strain, causing her to become ill and suffer a miscarriage. The jury returned an award in her favor. On appeal, the defendant argued that the jury should have been instructed that if the miscarriage was caused by the woman’s jumping backward, then the defendant was liable, but if it was caused by fright alone, then the defendant was not liable. After an extensive examination of case law from other jurisdictions, we held that “if defendant’s negligence was the proximate cause of fright, and fright, in natural and probable sequence, the proximate cause of physical injury, the chain of causation is complete, and the fright is not an independent cause.” *Id.* at 439, 203 N.W. at 649-50. We thus concluded that the woman was entitled to recover whether her injuries resulted from the jump backward or solely from the fright.

We considered analogous circumstances in *Netusil v. Novak*, 120 Neb. 751, 235 N.W. 335 (1931). There, the plaintiff was walking along a street when the defendant’s growling dog approached her in a crouched position with teeth bared, causing her to faint. As a result, she suffered “nervous prostration.” *Id.* at 755, 235

N.W. at 337. Citing *Hanford*, we noted that there can be liability for physical injuries which are proximately caused by fright and terror. We concluded that the defendant was liable to the plaintiff for her injuries.

Rasmussen v. Benson, 135 Neb. 232, 280 N.W. 890 (1938), involved a dairy farmer who bought a sack of unlabeled “bran” at a farm sale and fed it to his cows and other livestock. The next morning, after he had milked the cows and delivered the milk to his customers, the cows became very sick. Upon discovering this, the farmer notified all of his customers. The “bran” was subsequently found to contain arsenic. Most of the farmer’s livestock later died, and he lost the dairy business he had built up over a 10-year period. As a result of the nervous shock caused by the poisoning of his livestock, the loss of his business, and the fear of communicating the poison to his customers, the farmer became fatally ill and died. According to the medical testimony, he died of a “decompensated heart caused by an excessive emotional disturbance.” *Id.* at 233, 280 N.W. at 890. In finding that the seller of the poisoned bran was liable for the farmer’s death, we cited *Hanford* for the proposition that a physical injury resulting from an emotional upset produced by the negligence of another creates liability for damages. We noted that this proposition does not allow recovery for worry alone, unaccompanied by physical injury. We also clearly stated for the first time that recovery for physical injuries resulting from emotional distress is not limited to situations in which the fright was accompanied by physical impact.

In *Fournell v. Usher Pest Control Co.*, 208 Neb. 684, 305 N.W.2d 605 (1981), a young couple with two small children requested a termite inspection of a home they were buying. The defendant’s report indicated there was termite activity at one time, but no present damage. Approximately 3 months later, extensive termite damage was discovered, and the wife subsequently sought medical attention because she was constantly crying, could not sleep, and was deeply depressed. She was hospitalized on three occasions and was treated by a psychiatrist for over 3 years. Evidence indicated her mental distress was caused by the discovery of the termite infestation and the resulting damage to her home. This court noted that although we had abrogated

the impact rule, a plaintiff seeking recovery for negligently inflicted emotional distress was still required to show (1) that some type of physical injury resulted from the negligently inflicted suffering and (2) that the plaintiff was within the “‘zone of danger’” or actually feared for his or her own safety. *Id.* at 687, 305 N.W.2d at 607. Finding that the wife had not suffered any physical injury and that she had never been placed in fear of bodily harm to herself or anyone else, we held that her mental distress was not actionable. We distinguished *Rasmussen v. Benson*, *supra*, on the basis that the farmer suffered actual personal loss and that the seller’s act was so wanton and reckless as to approach intentional injury.

A dissent in *Fournell v. Usher Pest Control Co.*, *supra*, argued that the requirement that emotional harm must manifest itself in bodily harm was “outmoded and should be rejected.” *Id.* at 690, 305 N.W.2d at 608. The dissent reasoned:

To suggest that a psychological injury is not as grievous as a physical injury is to ignore reality. And to further suggest that if one can be sufficiently mentally disturbed so as to suffer a coronary occlusion, he or she may recover in tort, but if he or she simply becomes an emotionally distressed person, reduced to sniveling and crying and attempting suicide, he or she may not recover, does not seem to me to be founded upon any rational basis.

Id. at 690-91, 305 N.W.2d at 608. The dissent continued:

To therefore require that, before one who is mentally injured may recover, he must at least regurgitate once seems to me to be imposing upon the law a requirement that makes little or no sense. As I indicated at the outset, I would join with those jurisdictions which have adopted what I perceive to be the more modern view and would permit a cause of action to exist for mental anguish, absent bodily harm or other compensable damage.

Id. at 697, 305 N.W.2d at 611.

Four years later, this court decided *James v. Lieb*, 221 Neb. 47, 375 N.W.2d 109 (1985). In that case, two young siblings were riding their bicycles when a garbage truck negligently backed through a stop sign, killing the girl as her brother helplessly watched. The brother became physically ill and suffered

emotional distress. An action brought by the parents on behalf of their son was dismissed by the trial court based on a finding that the petition failed to meet the requirements of *Fournell v. Usher Pest Control Co.*, 208 Neb. 684, 305 N.W.2d 605 (1981), because it did not allege that the boy was within the “‘zone of danger’” or feared for his own safety. *James v. Lieb*, 221 Neb. at 48, 375 N.W.2d at 111. On appeal, we emphasized that *Fournell* concerned recovery by an alleged “‘direct victim’” of the defendant’s negligence, while *James* presented the issue of under what circumstances a bystander could recover for negligent infliction of emotional distress. *James v. Lieb*, 221 Neb. at 49, 375 N.W.2d at 111. We defined “‘bystander[s]’” as “those persons who are not immediately threatened with physical injury nor placed in fear for their own safety by the defendant’s negligence.” *Id.* In our analysis, we noted that California had abolished the zone-of-danger rule and allowed bystander recovery in *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968). *James v. Lieb*, *supra*. After examining the implications of *Dillon*, we concluded that “the *Dillon* approach based upon the reasonable foreseeability of the harm [is] a more logical and just method of determining a defendant’s liability than the artificial boundaries of recovery drawn by the ‘zone of danger’ rule.” *James v. Lieb*, 221 Neb. at 54, 375 N.W.2d at 114. After so concluding, we adopted the foreseeability approach of *Dillon*, with certain modifications.

First, we held that the relationship between the plaintiff and the victim was the most valuable in determining foreseeability, and thus required that there be a marital or intimate familial relationship between the plaintiff bystander and the victim. We then noted that the plaintiff was not required to experience actual sensory perception of the injury. Finally, we held that the emotional trauma must result from either death or serious injury to the victim.

Finally, but significantly, we addressed the *Fournell* requirement that a plaintiff must present evidence of a physical injury resulting from the emotional trauma. Agreeing with the rationale of the *Fournell* dissent, we rejected the physical injury requirement, noting that “[w]hile physical manifestation of the psychological injury may be highly persuasive, such proof is

not necessary given the current state of medical science and advances in psychology.” *James v. Lieb*, 221 Neb. at 58, 375 N.W.2d at 116.

James v. Lieb, 221 Neb. 47, 375 N.W.2d 109 (1985), clearly adopted a modified version of the *Dillon* test to be applied in bystander cases. Notably, however, *James* specifically overruled *Fournell v. Usher Pest Control Co.*, *supra*, only to the extent that *Fournell* was in conflict with *James*. Because *Fournell* involved a direct victim of the defendant’s negligence, while *James* involved a bystander, *James* did not completely abolish the zone-of-danger rule in Nebraska. The zone-of-danger rule is still applicable in direct-victim cases, and the modified *Dillon* rule is applicable in bystander cases. See *Sell v. Mary Lanning Memorial Hosp.*, 243 Neb. 266, 270, 498 N.W.2d 522, 524 (1993) (recognizing that notwithstanding *James v. Lieb*, *supra*, an action for negligent infliction of emotional distress may still be maintained “by a ‘direct victim’ of a defendant’s negligence”). Clearly, however, *James* did abolish the requirement that the emotional injury must be manifested in physical symptoms in order to be actionable, regardless of whether the claim is asserted by a bystander or by a direct victim of a negligent act.

Our jurisprudence from *Hanford v. Omaha & C. B. Street R. Co.*, 113 Neb. 423, 203 N.W. 643 (1925), through *James v. Lieb*, *supra*, expanded the class of plaintiffs who may recover for emotional injuries to include both direct victims and certain bystanders, without regard to whether there was a contemporaneous physical injury. However, as our law has evolved since *James*, we have placed specific limitations on the type of emotional injury which may be compensable in a negligence action. In *Turek v. St. Elizabeth Comm. Health Ctr.*, 241 Neb. 467, 488 N.W.2d 567 (1992), the plaintiff claimed that a nurse was negligent in performing medical procedures upon him which were beyond the scope of her licensure. He alleged that as a proximate result of the nurse’s negligence, he suffered headaches, sleeplessness, vomiting, and severe emotional distress. In determining whether such damages were recoverable, we adopted the standard used in intentional infliction of emotional distress cases which states that in order for “emotional distress to be compensable, it must be severe.” *Id.* at 481, 488 N.W.2d at 576, citing

Hassing v. Wortman, 214 Neb. 154, 333 N.W.2d 765 (1983), and *Pick v. Fordyce Co-op Credit Assn.*, 225 Neb. 714, 408 N.W.2d 248 (1987). Under this standard, we held that the plaintiff's claimed emotional injury "was, as a matter of law, not of sufficient severity to warrant compensation." *Turek v. St. Elizabeth Comm. Health Ctr.*, 241 Neb. at 481, 488 N.W.2d at 576.

[5] We refined the test for compensability of negligently inflicted emotional injury in *Schleich v. Archbishop Bergan Mercy Hosp.*, 241 Neb. 765, 491 N.W.2d 307 (1992). The plaintiff in that case was the mother of a patient who died while recovering from surgery at a hospital. Hospital officials notified the coroner that they considered the death suspicious, and as a result, the plaintiff was briefly detained and interviewed by police. She claimed to have suffered emotional distress resulting from the negligence of the hospital in notifying police of the death, and a jury returned a verdict in her favor. Reversing on appeal, we concluded that the evidence did not establish either negligence or compensable injury. With respect to the latter, we wrote that in order to be recoverable, "emotional distress must have been so severe that no reasonable person could have been expected to endure it" and that "the emotional anguish or mental harm must be medically diagnosable and must be of sufficient severity that it is medically significant." *Id.* at 770-71, 491 N.W.2d at 310-11. Because the plaintiff had presented no medical evidence in support of her claim, we held that she failed as a matter of law to prove that she had suffered severe emotional distress. We have continued to apply this two-pronged test in negligence actions where damages are sought for purely emotional injury. See, e.g., *Sell v. Mary Lanning Memorial Hosp.*, 243 Neb. 266, 498 N.W.2d 522 (1993); *Parrish v. Omaha Pub. Power Dist.*, 242 Neb. 731, 496 N.W.2d 914 (1993).

HAMILTON'S CLAIM FOR EMOTIONAL DISTRESS

Applying these principles to the instant case, we conclude that Hamilton falls within the class of plaintiffs who may seek damages for emotional injury caused by the negligence of another. As the operator of one of the vehicles involved in the collision, Hamilton was clearly within the zone of danger. Because he was thus a direct victim of the alleged negligence of the other driver, and not a bystander, his right to recover is not dependent upon

establishing a "marital or intimate familial relationship" with any other victim. See *James v. Lieb*, 221 Neb. 47, 55, 375 N.W.2d 109, 115 (1985).

The remaining issue is whether the specific emotional injury sustained by Hamilton is actionable under the criteria established by our cases. The record includes the expert opinion of Moore, a psychiatrist, that Hamilton suffers from posttraumatic stress disorder as a result of the 1997 accident. Moore testified that Hamilton exhibits symptoms of this disorder, including dreams and flashbacks, which warrant treatment. Moore referred to these symptoms as "clinically significant distress." This evidence is sufficient to meet the requirement that the emotional anguish or mental harm for which recovery is sought must be medically diagnosable and must be of sufficient severity that it is medically significant. See, *Sell v. Mary Lanning Memorial Hosp.*, *supra*; *Schleich v. Archbishop Bergan Mercy Hosp.*, *supra*.

However, as noted above, actionable emotional distress must also be " "so severe that no reasonable person could have been expected to endure it." " " *Sell v. Mary Lanning Memorial Hosp.*, 243 Neb. at 272, 498 N.W.2d at 525. Accord *Schleich v. Archbishop Bergan Mercy Hosp.*, *supra*. Our case law establishes a high threshold of severity under this standard. For example, in *Sell*, the plaintiff was informed by hospital employees that her 17-year-old son had died in a motorcycle accident. On the following day, the plaintiff was asked by the mortician to view the body, and she discovered that it was not that of her son, but of another 17-year-old male who had died in the accident. The plaintiff then learned that her son was alive and receiving care at the hospital. The plaintiff testified that following this incident, she cried continually, had difficulty eating, and required medication in order to sleep. We concluded that "[w]ithout minimizing plaintiff's apparent and understandable heartache upon being told of her son's death," she had failed as a matter of law to establish emotional distress meeting the standard of " "so severe that no reasonable person could have been expected to endure it." " " *Sell v. Mary Lanning Memorial Hosp.*, 243 Neb. at 272, 498 N.W.2d at 525.

Similarly, in *Andreasen v. Gomes*, 244 Neb. 73, 504 N.W.2d 539 (1993), *disapproved on other grounds*, *Darrah v. Bryan*

Memorial Hosp., 253 Neb. 710, 571 N.W.2d 783 (1998), parents sought recovery for emotional injuries resulting from the stillbirth of their child allegedly caused by the negligence of two physicians. The parents presented evidence that they suffered from headaches, nightmares, loss of sleep, and nausea, which an expert characterized as “‘severe emotional distress.’” *Id.* at 77, 504 N.W.2d at 542. We held that this evidence did not create a genuine issue of material fact with respect to actionable emotional distress. See, also, *Parrish v. Omaha Pub. Power Dist.*, 242 Neb. 731, 734, 496 N.W.2d 914, 916 (1993) (holding minor child’s reaction to her father’s death did not establish that death had “extraordinary effect, either psychological or physical” upon her, and therefore did not constitute “‘emotional distress . . . so severe that no reasonable person could have been expected to endure it’”).

While the evidence viewed in a light most favorable to Hamilton shows that he did experience diagnosable and clinically significant emotional distress resulting from the accident, it was not of sufficient severity to be actionable under our case law. Moore testified that posttraumatic stress disorder may range in severity from mild to severe. According to Moore, the posttraumatic stress disorder experienced by Hamilton falls within the lower half of the range, “[b]etween mild and moderate.” On the basis of information obtained from Hamilton, Moore described him as “pretty well beat up emotionally for a short period of time, but before too long he went on with his life.” Viewing this medical testimony, as well as Hamilton’s testimony describing his symptoms, in a light most favorable to Hamilton, we conclude that the emotional injury so described cannot, as a matter of law, be considered so severe that no reasonable person could be expected to endure it.

Accordingly, although our reasoning differs significantly from that of the district court, we conclude that the personal representative was entitled to summary judgment and that the district court did not err in denying Hamilton’s motion for new trial. We therefore affirm.

AFFIRMED.

HENDRY, C.J., and WRIGHT, J., not participating.

FARM BUREAU INSURANCE COMPANY OF NEBRASKA,
APPELLANT, v. JUSTIN MARTINSEN ET AL., APPELLEES.
659 N.W.2d 823

Filed April 18, 2003. No. S-02-563.

1. **Insurance: Contracts: Appeal and Error.** The interpretation of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination made by the lower court.
2. **Insurance: Contracts: Intent.** An insurance policy is a contract. An insurance contract is to be construed as any other contract to give effect to the parties' intentions at the time the contract was made.
3. **Contracts.** When the terms of a contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as the ordinary or reasonable person would understand them.
4. **Insurance: Contracts.** While an ambiguous insurance policy will be construed in favor of the insured, ambiguity will not be read into policy language which is plain and unambiguous in order to construe against the preparer of the contract.
5. **Insurance: Contracts: Proof.** Where coverage is denied, the burden of proving coverage under an insurance policy is upon the insured.

Appeal from the District Court for Hall County: JAMES LIVINGSTON, Judge. Reversed.

Gary J. Nedved, of Keating, O'Gara, Davis & Nedved, P.C.,
L.L.O., for appellant.

Dale A. Romatzke and Vikki S. Stamm, of Ross, Schroeder &
Romatzke, for appellees Diane Brundage and Paul Budzinski.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, McCORMACK, and
MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

The appellant, Farm Bureau Insurance Company of Nebraska (Farm Bureau), brought this declaratory judgment action in the district court for Hall County to determine the rights and liabilities of the parties under an automobile policy issued by Farm Bureau. The following individuals were named as defendants: Justin J. Martinsen; Andrew Martinsen; Laura Martinsen; Diane Brundage, individually and as personal representative of the estate of Jeffrey D. Budzinski; and Paul Budzinski (collectively the Appellees). At issue is whether Farm Bureau is liable for

certain claims of Paul Budzinski and Diane Brundage (collectively the Budzinskis) for negligent infliction of emotional distress suffered in connection with an automobile accident in which their son, Jeffrey Budzinski (Jeffrey), was killed. The district court concluded that Farm Bureau was liable up to the \$500,000 per-occurrence limits of the policy. Farm Bureau appeals. We reverse.

STATEMENT OF FACTS

On September 28, 1997, Justin Martinsen was driving an automobile insured by Farm Bureau when he struck Jeffrey, who was walking along the shoulder of U.S. Highway 281 in Howard County, Nebraska. Jeffrey was injured and later died from his injuries. Jeffrey's parents, the Budzinskis, filed a wrongful death action in the district court for Howard County against Justin Martinsen and against his father, Andrew Martinsen, as the owner of the automobile. The automobile was insured under the Farm Bureau policy at issue. The policy generally provided for bodily injury liability limits of \$300,000 per person and \$500,000 per occurrence. The Budzinskis' petition included a claim for recovery of medical expenses incurred by Jeffrey as a result of his injuries as well as claims for negligent infliction of emotional distress suffered by each of the Budzinskis.

A settlement was reached providing for \$300,000 for the medical expenses incurred by Jeffrey and for \$100,000 to each of the Budzinskis in connection with their claims for emotional distress. Justin Martinsen and Andrew Martinsen confessed judgment for the \$200,000 total amount for the Budzinskis' claims of emotional distress. The settlement agreement indicates that the Budzinskis agreed that their sole recourse in collecting the \$200,000 would be against Farm Bureau and that they would forbear collecting the \$200,000 from Justin Martinsen and Andrew Martinsen.

On January 22, 1999, Farm Bureau filed the instant declaratory judgment action to determine the extent of its liability under the terms of its automobile insurance policy issued to Andrew and Laura Martinsen. The issue in this case is whether Farm Bureau, having paid the \$300,000 per-person bodily injury limit, is further liable up to the \$500,000 per-occurrence limit.

The policy contained the following language:

The amount shown in the Declarations for Coverage A, **Bodily Injury**, “per person” is the maximum amount *we* will pay for all damages for **bodily injury** sustained by any one person in any one **automobile accident**. Subject to this “per person” limit, the amount shown in the Declarations for Coverage A, **Bodily Injury** “per occurrence” is the maximum amount *we* will pay for all damages for **bodily injury** resulting from any one **automobile accident**.

The policy also provided, “**Bodily Injury** means injury to a person’s body and includes sickness, disease or death which results from it.”

Farm Bureau argued that there was only one bodily injury due to this “one automobile accident” and that the Budzinskis’ claims of emotional distress were entirely dependent upon and derivative of the bodily injury to Jeffrey. Farm Bureau asserted that the extent of its liability in connection with the Budzinskis’ case was the \$300,000 per-person limit and that such liability had been satisfied because it had paid the \$300,000 settlement for Jeffrey’s medical expenses. Farm Bureau asserted that because the Budzinskis’ claims were entirely dependent upon the bodily injury to Jeffrey, their claims were subject to the single \$300,000 per-person limit which had been exhausted.

The Appellees asserted that Farm Bureau was liable up to the \$500,000 per-occurrence limit. The Appellees argued that the Budzinskis’ claims of emotional distress were direct and separate claims resulting from injuries they personally suffered and that damages for their claims should not be considered derivative of Jeffrey’s bodily injury, but should be limited only by the \$500,000 per-occurrence policy limit.

The case was tried on a stipulated set of facts. Paragraph 10 of the “Stipulation of Fact” reads as follows:

The plaintiff alleges that the maximum amount payable under its policy of insurance is the bodily injury limit of \$300,000.00 per person which it paid to the Estate of Jeffrey D. Budzinski in exchange for a full and complete release for wrongful death and medical expenses. Paul Budzinski and Diane Brundage claim that the plaintiff is obligated to pay the entire policy limits of \$500,000.00 and

satisfy the judgment for the emotional distress damages as set forth in the second cause of action in the petition filed in the District Court of Howard County and which provides as follows: "As a direct and proximate result of the negligence of the defendant, Justin J. Martinsen, plaintiffs' minor son was seriously injured; plaintiffs had an intimate familial relationship with their minor son and as a result of the serious injuries to their minor son, plaintiffs have suffered severe emotional distress such that no person could be expected to endure it."

On May 3, 2002, the district court entered an order declaring that Farm Bureau was liable up to the "'per occurrence'" policy limit of \$500,000. The district court determined that the Budzinskis had suffered "bodily injury" as that term was defined in the policy and that the Budzinskis' injuries were not derivative of Jeffrey's bodily injury. The court relied on *James v. Lieb*, 221 Neb. 47, 375 N.W.2d 109 (1985). The court reasoned that compensation was available because *James* recognized a tort claim for "'bystanders'" who suffered negligent infliction of emotional distress upon a showing of marital or intimate familial relationship with a victim who has been killed or seriously injured as a result of the negligence of another, even though such claimant had neither witnessed the incident nor exhibited a physical manifestation associated with emotional distress. The district court concluded that *James* recognized a distinct tort cause of action for separate and actual emotional injury to a claimant and that, therefore, such emotional injury was a "'sickness'" within the meaning of "bodily injury" under the policy and not derivative of injuries to the victim. Farm Bureau appeals.

ASSIGNMENTS OF ERROR

Farm Bureau asserts generally that the district court erred in determining that Farm Bureau was liable for the Budzinskis' emotional distress damages up to the policy's \$500,000 per-occurrence limit and asserts specifically that the district court erred in concluding (1) that the emotional injury suffered by the Budzinskis was "bodily injury" within the meaning of the policy and (2) that the Budzinskis' emotional distress claims were not derivative of Jeffrey's injuries.

STANDARD OF REVIEW

[1] The interpretation of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination made by the lower court. *American Fam. Mut. Ins. Co. v. Hadley*, 264 Neb. 435, 648 N.W.2d 769 (2002).

ANALYSIS

At issue in this case is whether under the stipulated facts and the policy of insurance issued by Farm Bureau, the amount payable under the policy is the bodily injury per-person limit of \$300,000 or the entire per-occurrence policy limit of \$500,000. The district court declared that Farm Bureau was liable up to the \$500,000 per-occurrence limit of the policy. Farm Bureau claims that the district court erred. We agree with Farm Bureau.

[2-4] An insurance policy is a contract. *American Fam. Mut. Ins. Co., supra*; *Callahan v. Washington Nat. Ins. Co.*, 259 Neb. 145, 608 N.W.2d 592 (2000). An insurance contract is to be construed as any other contract to give effect to the parties' intentions at the time the contract was made. *American Fam. Mut. Ins. Co., supra*; *Farmers Union Co-op Ins. Co. v. Allied Prop. & Cas.*, 253 Neb. 177, 569 N.W.2d 436 (1997). When the terms of a contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as the ordinary or reasonable person would understand them. *American Fam. Mut. Ins. Co., supra*; *Cincinnati Ins. Co. v. Becker Warehouse, Inc.*, 262 Neb. 746, 635 N.W.2d 112 (2001). While an ambiguous insurance policy will be construed in favor of the insured, ambiguity will not be read into policy language which is plain and unambiguous in order to construe against the preparer of the contract. *American Fam. Mut. Ins. Co., supra*; *Tighe v. Combined Ins. Co. of America*, 261 Neb. 993, 628 N.W.2d 670 (2001).

With regard to the issues in this case, the policy issued by Farm Bureau to Andrew and Laura Martinsen provides:

The amount shown in the Declarations for Coverage A, **Bodily Injury**, "per person" is the maximum amount we will pay for all damages for **bodily injury** sustained by any one person in any one **automobile accident**. Subject to this

“per person” limit, the amount shown in the Declarations for Coverage A, **Bodily Injury**, “per occurrence” is the maximum amount we will pay for all damages for **bodily injury** resulting from any one **automobile accident**.

The policy defines “bodily injury” as “injury to a person’s body and includes sickness, disease or death which results from it.” Giving the definition of “bodily injury” its plain and ordinary meaning, we conclude that the definition requires an injury to the body, and we further conclude that under the policy, a “bodily injury” that could give rise to a separate per-person claim must be a physical, as opposed to a purely emotional, injury.

[5] We have held that where coverage is denied, the burden of proving coverage under a policy is upon the insured. *Coppi v. West Am. Ins. Co.*, 247 Neb. 1, 524 N.W.2d 804 (1994); *Swedberg v. Battle Creek Mut. Ins. Co.*, 218 Neb. 447, 356 N.W.2d 456 (1984). In this case, Farm Bureau has effectively alleged a denial of coverage because it alleges in this declaratory judgment action that it is not liable for the additional \$200,000 related to the Budzinskis’ damages for emotional distress. Therefore, the Appellees had the burden to prove coverage under the policy.

According to the stipulated facts, with regard to their claims of negligent infliction of emotional distress, the Budzinskis asserted in their petition filed in the district court for Howard County against Justin Martinsen and Andrew Martinsen that they had “suffered severe emotional distress such that no person could be expected to endure it.” The record also shows that Justin Martinsen and Andrew Martinsen confessed judgment for damages of \$200,000 for the emotional distress alleged in the Budzinskis’ petition. Given the stipulated facts, the record establishes only that the Budzinskis suffered severe emotional distress. Notably, there is no allegation or fact in the record that the effects of the emotional distress included physical injury to their bodies, and none will be implied. See, e.g., *Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 826 (Tex. 1997) (“[o]ur conclusion that a claim for physical manifestations of mental anguish is not implicitly raised by a pleading of mental anguish is . . . in accord with several other jurisdictions that have addressed this specific issue”); *Garvis v. Employers Mut. Cas. Co.*, 497 N.W.2d 254 (Minn. 1993) (concluding insurer not

required to assume there were physical manifestations when none were alleged).

We recognize that in Nebraska, evidence of concurrent physical injury is not required to prove a claim of negligent infliction of emotional distress. *James v. Lieb*, 221 Neb. 47, 375 N.W.2d 109 (1985). That Nebraska tort law allows for recovery for emotional distress unaccompanied by physical manifestations does not mean that an insurance policy definition of “bodily injury” necessarily encompasses purely emotional injuries, and in this case, it does not. The Budzinskis’ assertion of emotional distress and the confession of judgment of Justin Martinsen and Andrew Martinsen thereto fail to establish that the Budzinskis suffered the concurrent physical injury necessary to meet the policy’s definition of “bodily injury.” Thus, although Justin Martinsen and Andrew Martinsen confessed judgment to the Budzinskis’ allegations of negligent infliction of emotional distress, and we, therefore, assume that the Budzinskis’ emotional distress was severe enough to recover for their emotional distress, such assumption of severity does not necessarily imply that the Budzinskis received a “bodily injury” as we have interpreted “bodily injury” under the policy. In this regard, we note that our overall analysis is in accord with other jurisdictions, and it has been observed:

Survivors who were not eyewitnesses to the accident have not been successful in persuading the courts that their actions for mental distress should be viewed as independent and separate bodily injury claims entitling them to be covered under “each person” liability limits provisions separate from the claim for bodily injury applicable to the deceased. 3 Irvin E. Schermer, *Automobile Liability Insurance* § 44.03[3] at 44-27 (3d ed. 1995).

According to the stipulated facts, Farm Bureau paid \$300,000 to the estate of Jeffrey D. Budzinski as a result of Jeffrey’s medical expenses arising from his bodily injury sustained in the September 28, 1997, automobile accident. This amount is the per-person limit under the policy. The Budzinskis’ claim of emotional distress seeks recovery for the emotional distress they suffered; however, their injuries were the result of Jeffrey’s bodily injury in the accident. On the record before us, it is Jeffrey’s injury and his resulting death which caused the Budzinskis the

emotional distress for which they sought relief from Justin Martinsen and Andrew Martinsen. That is, the Budzinskis claim damages resulting from the consequences of the accident involving Jeffrey. See *United Pacific Ins. v. Edgecomb*, 41 Wash. App. 741, 706 P.2d 233 (1985).

There is no evidence or suggestion in the record that the Budzinskis developed physical conditions causally related to the emotional distress they suffered as a result of the accident, and we do not consider whether this scenario, if established, could impose separate per-person liability on Farm Bureau whether or not the \$300,000 per-person limit had been exhausted. Upon the record before us, we determine that the Budzinskis' emotional distress is a byproduct of and entirely dependent upon the bodily injury to Jeffrey. Contrary to the district court's conclusion, the Appellees have not established that the Budzinskis' injuries are not derivative of Jeffrey's bodily injury and that under a plain reading of the policy, see *American Fam. Mut. Ins. Co. v. Hadley*, 264 Neb. 435, 648 N.W.2d 769 (2002), and *Cincinnati Ins. Co. v. Becker Warehouse, Inc.*, 262 Neb. 746, 635 N.W.2d 112 (2001), such claims are properly combined with the damage award for their son's injuries under the \$300,000 "per person" limit of the policy, which limit has been satisfied. Because Farm Bureau has paid \$300,000 due to Jeffrey's bodily injury, the per-person limit for Jeffrey's bodily injury has been reached, and there is no further payment available to the Budzinskis for damages attributable to his bodily injury. The district court's declaration that the Budzinskis were entitled to further relief up to the \$500,000 per-occurrence policy limit was error and must be reversed.

CONCLUSION

The policy's definition of "bodily injury" requires a physical injury to the body, and the Appellees have failed to allege or establish a "bodily injury" to anyone other than Jeffrey. The Appellees failed to establish that the Budzinskis' damages for emotional distress included "bodily injury" to them, and none will be implied on this record. Because the record shows that only Jeffrey sustained bodily injury, Farm Bureau's liability under the policy is limited to the single per-person limit of \$300,000 "for all damages for **bodily injury** sustained by any

one person in any one **automobile accident.**” The \$300,000 for medical expenses attributable to Jeffrey was paid and exhausted this limit. Thus, Farm Bureau had no further liability under the policy. We therefore reverse the district court’s decision that Farm Bureau was liable for additional damages up to the \$500,000 per-occurrence limit.

REVERSED.

HENDRY, C.J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
DEAN R. MINER, APPELLANT.
659 N.W.2d 331

Filed April 18, 2003. No. S-02-667.

1. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
2. **Rules of Evidence: Appeal and Error.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
3. **Circumstantial Evidence.** Circumstantial evidence is not inherently less probative than direct evidence.
4. **Convictions: Juries: Circumstantial Evidence.** In finding a defendant guilty beyond a reasonable doubt, a jury may rely upon circumstantial evidence and the inferences that may be drawn therefrom.
5. **Rules of Evidence: Words and Phrases.** Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
6. **Judges: Appeal and Error.** The exercise of judicial discretion is implicit in determinations of relevancy, and a trial court’s decision regarding it will not be reversed absent an abuse of discretion.
7. **Rules of Evidence.** The fact that evidence is prejudicial is not enough to require exclusion under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995), because most, if not all, of the evidence a party offers is calculated to be prejudicial to the opposing party; it is only the evidence which has a tendency to suggest a decision on an improper basis that is unfairly prejudicial under § 27-403.
8. **Verdicts: Juries: Appeal and Error.** Harmless error review looks to the basis on which the jury actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but,

rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.

Appeal from the District Court for Merrick County: MICHAEL OWENS, Judge. Affirmed.

Charles R. Maser, of Truell, Murray & Maser, P.C., for appellant.

Don Stenberg, Attorney General, and Kimberly A. Klein for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

After a jury trial, Dean R. Miner was convicted of one count of branding another's livestock in violation of Neb. Rev. Stat. § 54-1,124 (Cum. Supp. 2002) and sentenced to a term of imprisonment of 3 to 6 years. He perfected this direct appeal.

BACKGROUND

An information filed on June 19, 2001, charged Miner with willfully and knowingly branding or causing to be branded livestock owned by Gary Langenheder, or willfully and knowingly effacing, defacing, or obliterating Langenheder's brand, in Merrick County, Nebraska, "on or about March 22-March 26, 2001." See § 54-1,124. A jury trial was held on April 16 and 17, 2002.

At trial, Langenheder testified that he farms and also raises cattle near St. Libory, Nebraska. In March 2001, Langenheder was feeding 71 yearling heifers in a pen located approximately 1 mile from his home in Howard County. The cattle were branded with Langenheder's registered brand, consisting of a letter "U" over an arrow placed on the right hip of each heifer. At approximately 3:30 p.m. on March 22, Langenheder observed that all the cattle were in the pen.

When Langenheder went to the pen on the following morning, March 23, 2001, he observed that some of the gates had been opened and that some corral panels had been moved. He also noticed vehicle tracks leading to a cattle load-out facility. After

counting only 49 head of cattle, Langenheder concluded that someone had hauled away the other 22 heifers, and he notified law enforcement officials.

Approximately 5 days later, 10 of the missing heifers were located at a sale barn in Beatrice, Nebraska, and another 10 were located at a feedlot in Octavia, Nebraska. Langenheder and Rick Bickford, a criminal investigator and supervisor for the Nebraska Brand Committee, traveled to these locations and identified the heifers. Each of the 20 heifers had new purple ear tags with the name "D.R. Miner" and a number written on the tag.

Langenheder testified that he had branded his cattle approximately 30 days earlier. The cattle located in Beatrice and Octavia had new brands placed over Langenheder's brand on the right hip of each heifer. Each new brand consisted of an "M open 6" pattern and had fresh burn marks. The "M open 6" brand was issued to Miner in October 2000 and expired September 30, 2001. Photographs taken by Bickford depicting the new ear tags and the new brands on the cattle were offered and admitted at trial. Bickford testified that the placement and orientation of the brand on an animal are part of the brand. Miner's "M open 6" brand was to be placed on the left side of the animal. Bickford testified that some of the cattle appeared to have been rebranded more than once in different directions. Upon making inquiry, Bickford learned that the sale barn in Beatrice had issued payment for the cattle to an individual named "Lee Rankin," but that Miner was identified as the owner and seller of the cattle on sale documents dated March 26, 2001.

On March 29, 2001, Bickford and the sheriff of Howard County traveled to Miner's residence near Silver Creek, in Merrick County, Nebraska. When they initially asked Miner about the brands on the cattle, he blamed it on "the damn kids," but did not elaborate. Miner told Bickford that he bought the heifers from an individual in Grand Island, but could not locate the sale documents in his home. He then called the person he had identified as the seller and obtained by fax what Bickford referred to as a "makeshift bill of sale," reflecting a purchase of cows and bulls on November 20, 2000. Bickford doubted these were the cattle in question because the documents made no reference to calves which could have grown to the size of the heifers

located in Beatrice. Upon further questioning, Miner told Bickford that the “M open 6” brand had been placed on the heifers sideways because he had carpal tunnel syndrome. He also stated that the weather had been very cold when he branded the cattle 2 weeks earlier and that the cattle had been jumping around in the chute. Bickford testified that the brands did not appear to be 2 weeks old.

Miner then accompanied Bickford and the sheriff to an out-building on Miner’s property and showed Bickford his “M open 6” electric branding iron. While on Miner’s property, Bickford observed feedlot pens, a cattle working chute, corrals, and a cattle load-out chute. When Bickford suggested DNA testing of the heifers in order to prove that they came from the cows and bulls Miner had purchased, Miner stated he did not know which cows the heifers came from and that he no longer had the herd sires.

On the following morning, Miner met with Bickford and the sheriff at the Howard County courthouse in St. Paul, Nebraska. At that meeting, Miner produced a written statement which differed significantly from the account he had given Bickford and the sheriff on the previous day. The statement provided:

March 30, 2001

Over a year ago, a good friend, which we will call “Bob” owed me approximately \$25,000 for trucking.

After several attempts at trying to collect this money from him and not being able to, around the first of this year I really started pressuring him.

I knew “Bob” was in trouble because he had lost several of his trucks, and he had a family member dying of cancer. I figured “Bob” had to have some pretty high medical bills.

“Bob” finally contacted me on Wednesday March 21 saying that he still had some cattle and a trailer and that if I would settle for this, then he would turn them over to me and that was the best he could do.

I knew that “Bob” had cattle and a gooseneck trailer in the past and I figured this was the only way I would be able to get at least part of my money. I agreed to settle.

He ask [sic] me if I had a pick up that could pull a gooseneck, because he no longer had his pick up. I told “Bob” he could use it, the keys were in it.

He picked up the truck early Thursday night, March 22, and brought everything back sometime Saturday afternoon. I don't know exactly what time he came back as I was at a basketball tournament with my daughter all day Saturday in St. Paul. We didn't get home till after 9:00 pm and everything was here when we got home. There was a note in my pick up thanking me for letting him use it. When I went out Sunday morning to check the cows, "Bob" had put my brand and ear tags on them. "Bob" had mentioned there was a sale in Beatrice on Monday.

Had I known that the cattle were stolen, I sure wouldn't have accepted them.

Dean Miner

On March 31, 2001, the next afternoon, Bickford and the sheriff executed a search warrant at Miner's residence. One item seized during the search was a document stored on the hard drive of a computer in the home, from which it was printed. This document, identified as exhibit 63, was offered by the State at trial and received over the objection of Miner's counsel.

During his cross-examination, Bickford conceded that Miner never directly said he worked or branded the cattle at his residence. He admitted that his investigation produced no witnesses who had observed the cattle in question on Miner's property. Bickford further admitted that the branding iron was portable and that there was no physical evidence that the cattle had been at the Miner residence.

Testifying in his own defense, Miner stated that while living near Silver Creek, he bred cows and then raised and sold the calves. He testified that he bought 84 cows with calves and 3 bulls from an individual in Grand Island in November 1999. From that transaction, he produced two undated bills of sale, which differed from the bill of sale he originally furnished to Bickford.

Miner further testified that he had a trucking agreement with Gail Hammitt whereby Miner furnished a truck used by Hammitt's driver to pull Hammitt's trailers, for which Miner was to receive 26 cents for each mile driven. According to Miner, Hammitt failed to pay him under this agreement, and in October 2000, Miner agreed to take cattle from Hammitt in

partial payment of the debt. Miner produced a bill of sale for the transaction dated October 15, 2000, which states that Miner was to take possession of 126 pairs of "running aged" cows and 5 bulls after January 1, 2001.

On direct examination, Miner testified that cattle, including those which he subsequently sold in Beatrice, were delivered to his residence on March 23, 2001, while Miner was attending a basketball tournament. Miner claimed that when he returned home, he discovered that the cattle had been branded with his brand and that new ear tags had been affixed. He denied branding the cattle himself. He stated that he did not realize that the cattle may have been stolen until Bickford and the sheriff came to his home. At that time, Miner stated that he gave Bickford a different account of the delivery of the cattle because he wanted an opportunity to talk to Hammitt before accusing Hammitt. Miner subsequently admitted that the person referred to as "Bob" in his written statement dated March 30, 2001, is Hammitt.

On cross-examination, Miner explained that the 700-pound heifers delivered to him in March 2001 resembled the calves he had seen in Hammitt's pasture the previous October 2000. Miner stated that he paid \$418 for each cow-calf pair in October, and by March 2001, he had sold the heifers alone for \$500 each. Miner attributed this profit to favorable market conditions. Miner explained that Hammitt had started delivering cattle pursuant to the bill of sale on March 12, and delivered 100 head between then and March 23. Miner testified that he sold the cattle immediately because he had injured his back in an automobile accident. Miner claimed that he eventually discovered that all of the cattle he had sold were stolen. He explained that his trial testimony differed from his written statement because his previous attorney had advised him not to discuss his agreement to accept cattle from Hammitt. He denied any knowledge of Hammitt's present whereabouts, stating that he had heard that Hammitt had "left the country."

The case was submitted to the jury, and a verdict of guilty was returned on April 17, 2002. Miner was subsequently sentenced to a term of imprisonment of 3 to 6 years.

ASSIGNMENTS OF ERROR

Miner assigns that (1) there was insufficient evidence to convict him of the crime charged and (2) the district court erred in admitting exhibit 63.

STANDARD OF REVIEW

[1] When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Canaday*, 263 Neb. 566, 641 N.W.2d 13 (2002).

[2] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility. *State v. Davlin*, 263 Neb. 283, 639 N.W.2d 631 (2002); *State v. Pruett*, 263 Neb. 99, 638 N.W.2d 809 (2002).

ANALYSIS

SUFFICIENCY OF EVIDENCE

[3,4] Miner argues that there is insufficient evidence to support his conviction because “there simply was no evidence that the cattle in question were ever branded in Merrick County, Nebraska.” Brief for appellant at 8-9. While it is true that there is no *direct* evidence of this fact, it is supported by a considerable amount of circumstantial evidence. Circumstantial evidence is not inherently less probative than direct evidence. *State v. Nelson*, 262 Neb. 896, 636 N.W.2d 620 (2001); *State v. Castor*, 262 Neb. 423, 632 N.W.2d 298 (2001). In finding a defendant guilty beyond a reasonable doubt, a jury may rely upon circumstantial evidence and the inferences that may be drawn therefrom. *State v. Thompson*, 244 Neb. 375, 507 N.W.2d 253 (1993).

Viewed in a light most favorable to the State, we determine there is circumstantial evidence in the record from which a jury could reasonably conclude that Miner’s brand was placed over Langenheder’s brand while the cattle were on Miner’s property in Merrick County. The electric branding iron with which the cattle were branded was found at that property. Evidence in the

record indicates that the brand was registered to Miner and that the cattle all had his brand and ear tags when they arrived at the sale locations approximately 4 days after they were reported missing by Langenheder. In the various accounts Miner gave to investigators prior to trial, he did not specifically deny branding the cattle or being involved in the branding. He initially blamed the poor branding on "the damn kids," but subsequently tried to explain the poor branding by stating that he had carpal tunnel syndrome, that the weather was very bad on the day the branding was done, and that the cattle were jumping around. A reasonable inference could be drawn from this evidence that the branding occurred on Miner's property, and there is no dispute that the property was located in Merrick County. This assignment of error is without merit.

EXHIBIT 63

Exhibit 63, the document printed from the hard drive of a computer found at Miner's residence, states:

Every year hundreds of farmers have suffered the loss from cattle rustlers. It seems that the cattle are put out to pastures that have access roads that are easily reached and if the farmer has a large quantity of cattle, before he realizes they are gone, its [sic] too late to do anything about it.

We have just borrowed your cattle without your knowledge to prove a point. We know this is possible because it happened to us.

What we are suggesting is to let us bring back your cattle, and work with you to have a micro chip built that has a tracking device that can be inserted into the ear tag or directly under the skin of each head of cattle.

If you choose not to work with the tracking device we have started a calving facility that allows you to place your cows in as [sic] highly secured area that has a 24-hour monitoring system.

Call us today . . . Let us set [sic] down and work out a plan that's best for you.

Dean Miner or Lee Rankin

At the time this exhibit was offered by the State, Miner's counsel interposed the following objection:

Your Honor, I'm going to object to Exhibit 63 first of all because it was a result of the search which was subject of the Motion to Suppress. Secondly, there's no evidence that this ever was out in the public domain, ever was anywhere other than on the computer. The probative value of that is far outweighed by the prejudicial effect that might have on my client. Absolutely no evidence that this thing was ever published anywhere.

The objection was overruled, and Bickford was allowed to read the contents of the exhibit to the jury. Miner subsequently testified that he had no knowledge of the document until several months into the investigation.

[5,6] Miner argues on appeal that exhibit 63 was irrelevant and therefore inadmissible under Neb. Evid. R. 402, Neb. Rev. Stat. § 27-402 (Reissue 1995), or, alternatively, that any probative value of the exhibit was outweighed by its prejudicial effect, thus making the exhibit inadmissible under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995). Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *State v. McLemore*, 261 Neb. 452, 623 N.W.2d 315 (2001); *State v. Canbaz*, 259 Neb. 583, 611 N.W.2d 395 (2000); Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1995). The exercise of judicial discretion is implicit in determinations of relevancy, and a trial court's decision regarding it will not be reversed absent an abuse of discretion. *State v. Brouillette*, ante p. 214, 655 N.W.2d 876 (2003); *State v. Haltom*, 264 Neb. 976, 653 N.W.2d 232 (2002).

The manner in which Langenheder's cattle came into Miner's possession was a fact of consequence to the determination of the action in that the State was required to prove that Miner "willfully and knowingly" either branded livestock owned by another or defaced the owner's brand. § 54-1,124. From exhibit 63, it could reasonably be inferred that Miner and Rankin, whose names both appear on the Beatrice sale documents, were involved in the planning or execution of a scheme whereby cattle were removed from the owner's premises without the owner's knowledge. Thus, assuming without deciding that Miner's trial

objection was sufficiently specific to raise an issue of relevance, the district court did not abuse its discretion in overruling it on that ground.

[7,8] The objection clearly did raise the issue of whether exhibit 63 should have been excluded under § 27-403, which requires exclusion of relevant evidence “if its probative value is substantially outweighed by the danger of unfair prejudice.” The fact that evidence is prejudicial is not enough to require exclusion under this rule, because most, if not all, of the evidence a party offers is calculated to be prejudicial to the opposing party; it is only the evidence which has a tendency to suggest a decision on an improper basis that is unfairly prejudicial under § 27-403. *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001). Although we do not regard exhibit 63 as having a particularly high degree of probative value, neither can we say that its receipt into evidence resulted in unfair prejudice to Miner. While the exhibit supports an inference that Miner was involved in “borrowing” cattle owned by others without their knowledge, it also supports an inference that such actions were not taken with larcenous intent, but, rather, were part of a misguided promotion of bovine security services offered by Miner and Rankin. We therefore cannot say that the district court abused its discretion in not excluding this evidence under § 27-403. Even if we did find error in this regard, we would consider it harmless. Harmless error review looks to the basis on which the jury actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error. *State v. Duncan*, ante p. 406, 657 N.W.2d 620 (2003); *State v. Brouillette*, *supra*. Based upon our review of the entire record, including the undisputed evidence that Miner’s brand was placed over that of Langenheder’s on each of the stolen heifers and Miner’s conflicting accounts of the manner in which the cattle came into his possession, we have no difficulty in concluding that the guilty verdict was surely unattributable to the admission of exhibit 63.

CONCLUSION

There is sufficient circumstantial evidence in the record to support a finding that the charged offense was committed by Miner

at his residence in Merrick County, and there was no reversible error in receiving exhibit 63 in evidence over Miner's objection. The judgment of the district court is therefore affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. SPECIAL COUNSEL FOR DISCIPLINE
OF THE NEBRASKA SUPREME COURT, RELATOR,
V. JOHN P. ELLIS, RESPONDENT.

659 N.W.2d 829

Filed April 18, 2003. No. S-03-414.

Original action. Judgment of suspension.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN,
McCORMACK, and MILLER-LEMAN, JJ.

PER CURIAM.

INTRODUCTION

Respondent, John P. Ellis, was admitted to the practice of law in the State of Nebraska on September 8, 1982, and at all times relevant hereto was engaged in the private practice of law in Douglas County, Nebraska. On March 24, 2003, a "Complaint" (hereinafter referred to as the "formal charge") was filed against respondent. The formal charge sets forth a single count which charges the respondent with violating his oath of office as an attorney, Neb. Rev. Stat. § 7-104 (Reissue 1997), and the following provisions of the Code of Professional Responsibility: Canon 1, DR 1-102(A)(1) (violation of disciplinary rule); DR 1-102(A)(4) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation); DR 1-102(A)(5) (engaging in conduct prejudicial to the administration of justice); DR 1-102(A)(6) (engaging in conduct that adversely reflects on fitness to practice law); Canon 6, DR 6-101(A)(3) (neglect); DR 6-102(A) (attempting to exonerate self or limit liability for malpractice); Canon 7, DR 7-101(A)(2) (failure to carry out contract for employment); and DR 7-101(A)(3) (engaging in conduct prejudicial to client).

FACTS

On March 24, 2003, respondent filed with this court a conditional admission of guilt in which respondent admitted the formal charge and effectively waived all proceedings against him in connection therewith. In summary, the formal charge alleges as follows: that respondent neglected a client's case causing the same to be dismissed; that he misled the client with regard to the status of her case; and that he provided false, misleading, and fraudulent information to the Counsel for Discipline's office which was investigating a grievance filed against respondent by the client whose case was dismissed.

ANALYSIS

Neb. Ct. R. of Discipline 13 (rev. 2002) provides in pertinent part:

(B) At any time after the Clerk has entered a Formal Charge against a Respondent on the docket of the Court, the Respondent may file with the Clerk a conditional admission of the Formal Charge in exchange for a stated form of consent judgment of discipline as to all or part of the Formal Charge pending against him or her as determined to be appropriate by the Counsel for Discipline or any member appointed to prosecute on behalf of the Counsel for Discipline; such conditional admission is subject to approval by the Court. The conditional admission shall include a written statement that the Respondent knowingly admits or knowingly does not challenge or contest the truth of the matter or matters conditionally admitted and waives all proceedings against him or her in connection therewith. If a tendered conditional admission is not finally approved as above provided, it may not be used as evidence against the Respondent in any way.

Pursuant to rule 13, we find that respondent knowingly admits the facts outlined in the formal charge and knowingly admits that he violated DR 1-102(A)(1), (4), (5), and (6); DR 6-101(A)(3); DR 6-102(A); and DR 7-101(A)(2) and (3), as well as his oath of office as an attorney. We further find that respondent waives all proceedings against him in connection herewith.

CONCLUSION

Based on the conditional admission of respondent, the recommendation of the Special Counsel for Discipline, and our independent review of the record, we find by clear and convincing evidence that respondent has violated DR 1-102(A)(1), (4), (5), and (6); DR 6-101(A)(3); DR 6-102(A); and DR 7-101(A)(2) and (3), as well as his oath of office as an attorney, and that respondent should be suspended for a period of 1 year, effective immediately, after which time respondent may apply for reinstatement. Respondent shall comply with Neb. Ct. R. of Discipline 16 (rev. 2001), and upon failure to do so, he shall be subject to punishment for contempt of this court. Accordingly, respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997) and Neb. Ct. R. of Discipline 23(B) (rev. 2001).

JUDGMENT OF SUSPENSION.

GREGORY ALAN DAVIS, APPELLANT, v.
JUANITA ALVAREZ DAVIS, APPELLEE.

660 N.W.2d 162

Filed April 24, 2003. No. S-01-1239.

1. **Summary Judgment.** Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law. On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
3. **Divorce: Modification of Decree: Property Division: Fraud.** A property division in a dissolution of marriage decree from which no appeal is taken is not subject to modification and ordinarily will not thereafter be vacated or modified as to such property provisions in the absence of fraud or gross inequity.
4. **Courts: Jurisdiction.** A court that has jurisdiction to make a decision also has the power to enforce it by making such orders as are necessary to carry its judgment or decree into effect.
5. **Modification of Decree: Alimony: Good Cause.** Pursuant to Neb. Rev. Stat. § 42-365 (Reissue 1998), alimony orders may be modified or revoked for good cause shown.

6. **Prejudgment Interest: Claims.** Prejudgment interest is available only when a claim is liquidated, that is, when there is no reasonable controversy either as to the plaintiff's right to recover or as to the amount of such recovery. There must be no dispute either as to the amount or as to the plaintiff's right to recover.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed as modified.

Michael W. Heavey, of Colombo & Heavey, P.C., for appellant.

Eileen Reilly Buzzello, of Holthaus Law Offices, for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, McCORMACK, and MILLER-LERMAN, JJ.

McCORMACK, J.

NATURE OF CASE

Gregory Alan Davis appeals from an order of the district court for Sarpy County entering judgment in favor of Gregory's ex-wife, Juanita Alvarez Davis. The issues raised in this case are whether Gregory's application filed in district court was an attempt to modify or enforce the parties' dissolution decree and whether the district court had the authority to provide Gregory with his requested relief.

BACKGROUND

Gregory and Juanita's marriage ended when the district court entered a dissolution decree in 1993. Among other things, the decree ordered Juanita to pay child support to Gregory in the amount of \$150 per month commencing August 1, 1993, and continuing until further order of the court. The decree also ordered a division of numerous items of personal property between the parties as well as an equal division of several marital debts. Finally, the decree ordered that upon Gregory's retirement from the U.S. Air Force, Juanita was to be awarded as property settlement 27.5 percent of Gregory's monthly retirement benefits. Juanita appealed the final decree to the Nebraska Court of Appeals. In an unpublished opinion, the Court of Appeals slightly modified the division of the marital debts, but otherwise affirmed the district court's decision. *Davis v. Davis*, No. A-93-756, 1994 WL 135220 (Neb. App. April 19, 1994) (not designated for permanent publication).

On January 19, 2001, Gregory filed an "Amended Application to Determine Amounts Due Pursuant to Decree and to Enforce Decree by Set Off" in the district court. In count I of the application, Gregory alleged that Juanita had failed to pay her share of the marital debts and that Gregory had been required to pay Juanita's share of the debts. In count II of the application, Gregory alleged that Juanita had failed to pay any child support to Gregory. In count III of the application, Gregory alleged that Juanita had failed to give Gregory those items of personal property awarded to him in the final decree and that he had suffered damages as a result. Finally, Gregory alleged that he had received \$18,088.48 in retirement benefits to which Juanita was entitled. Gregory prayed for an order:

1. Finding and ordering that there is due to [Gregory], from [Juanita], pursuant to the provisions of the Decree and Modification entered herein, the sum of \$40,102.04 principal, together with interest thereon in the amount of \$33,396.94 through December 31, 2000, together with accruing interest;

2. Finding and ordering that all future Air Force retirement benefits payable to [Juanita] from Defense Finance and Accounting Service be delivered by Defense Finance and Accounting Service to the Clerk of the District Court of Sarpy County, Nebraska, for application to the satisfaction of the amount found to be due to [Gregory] until such time as said amount is paid, in full, along with all interest, court costs and attorney's fees allowed by the Court;

3. Awarding [Gregory] his court costs incurred herein, including a reasonable sum for the attorney's fees incurred in the prosecution of this proceeding; and,

4. Granting such other and further relief as the Court deems just.

In her answer, Juanita denied the material allegations of Gregory's application and affirmatively alleged that the district court was without jurisdiction over counts I and III of Gregory's application.

Each party filed a motion for summary judgment. Juanita's motion was unaccompanied by any supporting evidence, thus, it was treated as a motion for judgment on the pleadings.

In its August 29, 2001, order, the district court concluded that there was no dispute that Juanita had failed to make any child support payments to Gregory and that Gregory was entitled \$6,314.54. The district court also concluded that there was no dispute that Juanita was entitled to \$18,088.48 in retirement benefits which were paid to Gregory.

As to counts I and III of Gregory's application, the district court found that the application was an attempt to modify the final decree by ordering Juanita to reimburse Gregory for her share of the unpaid marital debts and by ordering Juanita to pay Gregory an amount representing the value of the personal property awarded to Gregory in the decree. The court, citing *Bokelman v. Bokelman*, 202 Neb. 17, 272 N.W.2d 916 (1979), found that a property division in a dissolution decree was not subject to modification and that, therefore, the court had no jurisdiction to grant Gregory the relief sought in counts I and III. After offsetting the retirement benefits against the child support debt, the court entered judgment for Juanita in the amount of \$11,773.94. Gregory's motion for new trial was overruled, and Gregory appealed.

ASSIGNMENTS OF ERROR

Gregory assigns that the district court erred (1) in determining that it lacked jurisdiction to enforce its decree; (2) in determining that it lacked jurisdiction to determine the amounts due to Gregory under certain property settlement provisions of the decree while simultaneously determining that it possessed jurisdiction to determine amounts due to Juanita under other property settlement provisions of the decree; (3) in refusing to determine the amount due to Gregory for the personal property which had been awarded to him, but which Juanita converted to her own use and benefit; (4) in refusing to determine the amount due to Gregory for payment of Juanita's share of the marital debts of the parties; (5) in failing to award Gregory prejudgment interest on the money which he paid out and on the value of the personal property which was awarded to Gregory and converted by Juanita; (6) in awarding Juanita a judgment against Gregory when the total amount owed to Gregory exceeded the amount of the credit to which Juanita was entitled; and (7) in making an

unauthorized grant of relief extraneous to the issues raised by the pleadings in the form of a judgment in favor of Juanita.

STANDARD OF REVIEW

[1] Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *American Fam. Mut. Ins. Co. v. Hadley*, 264 Neb. 435, 648 N.W.2d 769 (2002).

[2] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law. On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *In re Interest of Anthony R. et al.*, 264 Neb. 699, 651 N.W.2d 231 (2002).

ANALYSIS

[3,4] The issue in this case is whether the application filed by Gregory is an attempt to enforce or modify the terms of the divorce decree. "We have . . . consistently held that a property division in a dissolution of marriage decree from which no appeal is taken is not subject to modification, and ordinarily will not thereafter be vacated or modified as to such property provisions in the absence of fraud or gross inequity." *Bokelman v. Bokelman*, 202 Neb. 17, 21, 272 N.W.2d 916, 919 (1979). Thus, if the district court was correct in characterizing Gregory's application as one attempting to modify the divorce decree, it was also correct in finding that it had no authority to enter judgment in Gregory's favor for the value of the personal property awarded to him or for the marital debts. However, if Gregory's application is instead an attempt to enforce the divorce decree, the district court erred in finding that it had no jurisdiction over counts I and III of the application. A court that has jurisdiction to make a decision also has the power to enforce it by making such orders as are necessary to carry its judgment or decree into effect. *Laschanzky v. Laschanzky*, 246 Neb. 705, 523 N.W.2d 29 (1994).

We first consider whether Gregory's request to order Juanita to pay him her share of the marital debts is an enforcement or

modification of the decree. In *Dennis v. Dennis*, 6 Neb. App. 461, 574 N.W.2d 189 (1998), a divorce decree ordered the husband to make the payments on a home equity loan. He did not make the payments, and the wife was required to pay off the loan to avoid foreclosure on the home, which had been awarded to her. The wife filed an application to modify the decree in district court, praying that the husband be ordered to pay her the amount she had to pay to satisfy the loan. The Court of Appeals stated that “the relief she sought, a judgment for the amount she paid . . . was actually not in the nature of a *modification*, but, rather, a determination of amounts due under the decree and an award to her of said amounts.” (Emphasis in original.) *Id.* at 463, 574 N.W.2d at 191. The court held:

In sum, we view the action taken by the district court as nothing more and nothing less than enforcing that portion of the decree which obligated [the husband] to hold [the wife] harmless from the debt. As an example, and on a smaller scale, had the decree obligated [the husband] to pay a credit card debt of \$2,000 holding [the wife] harmless on the debt and he failed to do so, resulting in a suit against [the wife] who, before judgment (or after for that matter) borrowed funds from a third person to pay the amount owing, there is little doubt that an order for [the husband] to reimburse that amount to [the wife] would be appropriate.

Id. at 465, 574 N.W.2d at 192.

Dennis is on point with one aspect of the case at bar. The final decree entered by the district court in this case ordered that “all marital debts . . . are deemed marital debts and *each party shall pay 50% of those debts.*” (Emphasis supplied.) The particular relief sought by Gregory in his application is an attempt to enforce the precise obligation imposed on Juanita by the decree, that is, to pay 50 percent of the marital debts. Whether those payments are directed to Gregory or another is immaterial. As this request by Gregory is an attempt to enforce the decree, the district court erred in finding that it had no jurisdiction over count I of the application.

We next consider whether an order that Juanita pay Gregory the value of the personal property awarded to him in the decree is an enforcement or modification of the decree. Juanita argues that

this issue is controlled by *Sturdevant v. Sturdevant*, 5 Neb. App. 502, 560 N.W.2d 864 (1997). In *Sturdevant*, a divorce decree awarded the husband certain items of personal property and also ordered the husband to pay his wife a lump-sum alimony award. The husband later filed a motion for discharge of lump-sum alimony, alleging that his wife converted the property awarded to him to her own use. He asked the district court to apply the value of the lost property as a credit against the lump-sum alimony award. The district court found that the wife did not convert the property and declined to apply any amount as a credit against the alimony award. On appeal, the Court of Appeals concluded that the husband “was attempting to modify the parties’ decree” and that “[t]he district court was without authority to modify the decree in these proceedings under either Neb. Rev. Stat. § 25-2001 (Reissue 1995) or its independent equity jurisdiction.” *Sturdevant*, 5 Neb. App. at 506, 560 N.W.2d at 867.

[5] We decline to apply *Sturdevant* to the present case because *Sturdevant* is distinguishable from the present case. The Court of Appeals in *Sturdevant* found that the district court did not err in finding that the wife did not convert any of the husband’s personal property. Here, Gregory presented unrefuted evidence that Juanita had converted to her own use the personal property awarded to him in the decree. In addition, *Sturdevant* was a case seeking to modify an award of alimony. It is well known that pursuant to Neb. Rev. Stat. § 42-365 (Reissue 1998), alimony orders may be modified or revoked for good cause shown. *Bowers v. Scherbring*, 259 Neb. 595, 611 N.W.2d 592 (2000). Gregory’s request that he be awarded the value of the personal property awarded to him in the decree and converted by Juanita was an enforcement of the divorce decree. As such, the district court erred in finding that it had no jurisdiction over count III of the application.

Finally, we consider Gregory’s retirement benefits. The decree ordered that 27.5 percent of Gregory’s Air Force retirement benefits be awarded to Juanita. Gregory has received \$18,088.48 in retirement benefits to which he admits Juanita is entitled. The district court offset against this amount the child support debt of \$6,314.54. Gregory requests that this net amount of \$11,773.94 be set off against any amount owed to him and that 100 percent of the retirement benefits be awarded to him in the future until any

amount owed to him by Juanita is satisfied. We determine that Gregory may offset the \$11,773.94 owed to Juanita against the amount owed to him for Juanita's share of the marital debt and personal property. We decline to modify the property settlement agreement so as to change the payee from Juanita to the clerk of the district court as requested by Gregory.

[6] Gregory also assigns that the district court erred in failing to award prejudgment interest on "the money which he paid out" and on the value of the personal property. Prejudgment interest is available only when a claim is liquidated, that is, when there is no reasonable controversy either as to the plaintiff's right to recover or as to the amount of such recovery. There must be no dispute either as to the amount or as to the plaintiff's right to recover. *Blue Tee Corp. v. CDI Contractors, Inc.*, 247 Neb. 397, 529 N.W.2d 16 (1995). We conclude that Gregory's claim is unliquidated. The district court did not err in failing to award prejudgment interest.

CONCLUSION

The district court awarded Gregory \$6,314.54, representing past-due child support. The district court further awarded Juanita \$18,088.48, representing her share of Gregory's retirement benefits. After offsetting these amounts, the district court entered judgment in favor of Juanita in the amount of \$11,773.94. We affirm this award.

For the reasons set forth above, we conclude that the district court erred in finding that it did not have the authority to award Gregory amounts representing (1) the value of the personal property awarded to him in the decree and (2) Juanita's 50-percent share of the marital debts. Gregory offered undisputed evidence that these amounts were \$4,806 and \$44,378.53, respectively. Thus, we conclude that Juanita should be ordered to pay Gregory the sum of \$49,184.53. After offsetting the \$11,773.94 owed to Juanita, we enter judgment in favor of Gregory and against Juanita in the amount of \$37,410.59.

AFFIRMED AS MODIFIED.

AGRI AFFILIATES, INC., APPELLEE, v. CALVIN R. BONES AND
AUDREY J. BONES, TRUSTEES OF THE CALVIN R. AND
AUDREY J. BONES FAMILY TRUST, APPELLANTS.

660 N.W.2d 168

Filed May 2, 2003. No. S-01-1074.

1. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Insurance: Negligence: Case Overruled.** To the extent *Simon v. Wilkinson Agency*, 2 Neb. App. 877, 518 N.W.2d 154 (1994), holds that negligent misrepresentation is a recognizable theory of recovery only in the context of the relationship between an insurer and his or her agent, it is overruled.
4. **Appeal and Error.** Error without prejudice provides no ground for appellate relief.
5. **Actions: Fraud: Proof.** To recover on a fraudulent misrepresentation claim, one must show (1) that a representation was made; (2) that the representation was false; (3) that when made, the representation was known to be false or made recklessly without knowledge of its truth and as a positive assertion; (4) that it was made with the intention that it should be relied upon; (5) that the party reasonably did so rely; and (6) that he or she suffered damage as a result.
6. **Actions: Negligence: Proof.** To recover on a negligent misrepresentation claim, one must demonstrate, inter alia, that one who, in the course of his or her business, profession, or employment, or in any other transaction in which he or she has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he or she fails to exercise reasonable care or competence in obtaining or communicating the information.
7. **Fraud: Negligence: Words and Phrases.** The difference between fraudulent misrepresentation and negligent misrepresentation is the duty required in each claim. In fraudulent misrepresentation, one becomes liable for breaching the general duty of good faith or honesty. However, in a claim of negligent misrepresentation, one may become liable even though acting honestly and in good faith if one fails to exercise the level of care required under the circumstances.
8. **Real Estate: Sales: Agents.** A real estate seller's agent has a duty (a) to perform the terms of the written agreement made with the client; (b) to exercise reasonable skill and care for the client; (c) to promote the interests of the client with the utmost good faith, loyalty, and fidelity; (d) to account in a timely manner for all money and property received; (e) to comply with all requirements of Neb. Rev. Stat. §§ 76-2401 to 76-2430 (Reissue 1996), the Nebraska Real Estate License Act, and any rules and regulations promulgated pursuant to such sections or act; and (f) to comply with any

- applicable federal, state, and local laws, rules, regulations, and ordinances, including fair housing and civil rights statutes and regulations.
9. **Real Estate: Brokers.** When the broker secures a prospective buyer who is ready, willing, and able to purchase the subject property, the person who hired the broker has received the service for which he or she has contracted, and the broker's right to compensation cannot be impaired by either the subsequent inability or unwillingness of a purported owner to consummate the sale on the terms prescribed.
 10. **Affidavits.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify as to the matters stated therein.
 11. **Summary Judgment: Evidence: Appeal and Error.** Ordinarily, the erroneous admission of evidence in a summary judgment hearing is not reversible error if other relevant evidence, admitted without objection or properly admitted over objection, sustains the trial court's necessary factual findings.

Appeal from the District Court for Lincoln County: DONALD E. ROWLANDS II, Judge. Affirmed.

Claude E. Berreckman, Jr., of Berreckman & Berreckman, P.C., for appellants.

Terrance O. Waite and Keith A. Harvat, of Waite & McWha, for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

HENDRY, C.J.

INTRODUCTION

Agri Affiliates, Inc., sued Calvin R. Bones and Audrey J. Bones, trustees of the Calvin R. and Audrey J. Bones Family Trust, for a commission resulting from the sale of real estate. In their answer, the Boneses pled several defenses and filed a counterclaim for, inter alia, damages resulting from their defense costs in *Keller v. Bones*, 260 Neb. 202, 615 N.W.2d 883 (2000). Both parties filed motions for summary judgment. The Lincoln County District Court overruled the Boneses' motion for summary judgment and dismissed their counterclaim. Agri Affiliates' motion for summary judgment was granted. This appeal followed. We moved this case to our docket pursuant to our authority to regulate the caseloads between this court and the Nebraska Court of Appeals. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

FACTUAL BACKGROUND

The Boneses entered into an exclusive listing agreement with Agri Affiliates on May 24, 1997, to sell ranch land near North Platte, Nebraska, which was owned by the trust. That agreement provided that Agri Affiliates, as broker, was to receive a commission of 6 percent for services provided “upon the Broker finding a purchaser who is ready, willing and able to complete the purchase as proposed by the Owner.” The parties agreed that the listing price for the property was to be \$490,000, or \$245 per acre. At Calvin’s request, the listing agreement included language drafted by John Childears, managing partner and a broker at Agri Affiliates, which provided that “Seller reserves current Tenant from this listing for six (6) months from date of Seller’s signature. If Tenant is successful buyer within said six months, Broker will close the sale and receive 1% commission.”

Both Calvin and Audrey testified that the current tenant of the property, Lydic Brothers, had been notified that the property was for sale, and further that they had inquired of Don Lydic, a representative of Lydic Brothers, whether Lydic Brothers would be interested in purchasing the property. The record shows Lydic Brothers made an offer “somewhere between . . . 190 and \$200 an acre” prior to the Boneses’ entering into the listing agreement with Agri Affiliates. Lydic’s testimony also revealed that he was informed the property had been listed and was aware of the “split sales commission” arrangement.

Loren Johnson, the broker who handled the sale for Agri Affiliates, testified that he would periodically contact Lydic to determine whether Lydic Brothers was interested in the property. Mike Polk, another Agri Affiliates agent, also contacted Lydic sometime between July 10 and 17, 1997, informing him that an offer of \$220 per acre on the property had been received. Lydic responded by saying, “I think we are interested in it, but why . . . should [we] bid against ourselves” Thereafter, on July 17, Johnson telephoned Lydic, notifying him that Agri Affiliates had a buyer who was planning to make a full price offer. According to Lydic, he responded to this July 17 notification by telling Johnson, “‘Loren, that’s a lot of money, you know.’” Shortly after this telephone conversation, Johnson met with Dean Keller, who made an offer for the property at the full

list price of \$245 per acre. Johnson had no further contact with Lydic after receiving Keller's offer.

The purchase agreement signed by Keller was to expire at 5 p.m. on July 21, 1997, and was sent to the Boneses at their home in Council Bluffs, Iowa. After receipt of the Keller offer, the Boneses and Johnson had a telephone discussion late in the afternoon of July 21 regarding the offer. Before signing the agreement, the Boneses asked if Lydic Brothers had any interest in the property; Johnson replied that it did not.

In their testimonies, both Calvin and Audrey also indicate that in response to their hesitation about signing the purchase agreement, Johnson told them that "it doesn't make any difference to me whether you take the offer or not. They have met the asking price, and therefore you owe us the commission." The purchase agreement was then signed and faxed to Agri Affiliates at 4:53 p.m. on July 21, 1997. At 5:12 p.m., after receiving the faxed purchase agreement, Johnson called Keller and left a message on Keller's answering machine informing him that his offer had been accepted. In *Keller v. Bones*, 260 Neb. 202, 615 N.W.2d 883 (2000), this court held that a valid contract for the purchase of the property in question existed between the Boneses and Keller.

On the morning of July 22, 1997, Lydic called the Boneses to inquire about the property. At that time, he was informed that a purchase agreement for the full listing price had already been signed. Lydic then informed the Boneses that Lydic Brothers would purchase the property at the same price. Calvin called Johnson at Agri Affiliates to inform him that they wished to sell to Lydic Brothers instead of Keller. The Boneses' desire to sell to Lydic Brothers was driven by the fact that under such a circumstance, the Boneses would be required to pay only a 1-percent commission, rather than the 6-percent commission if Keller purchased the property. Johnson testified that after he spoke to Calvin, he discussed the matter with Childears. Thereafter, Johnson left another message on Keller's answering machine, inquiring whether Keller would "let the Boneses out of the contract." Keller refused to do so and further requested Agri Affiliates to fax a copy of the purchase agreement to his attorney, which was done. Agri Affiliates also deposited Keller's earnest money check in its trust account.

Agri Affiliates brought this action in Lincoln County District Court for the payment of the 6-percent commission under the listing agreement. The Boneses' answer alleged several defenses, specifically, negligent misrepresentation, fraudulent misrepresentation, and breach of fiduciary duty. The Boneses also asserted a counterclaim against Agri Affiliates for (1) defense costs from *Keller, supra*; (2) loss of the opportunity to sell to Lydic Brothers; and (3) loss of the use of the net proceeds and interest that would have been earned from a sale to Lydic Brothers.

Both parties filed motions for summary judgment and offered evidence in support of their respective motions. The only objection to any of the evidence offered by either party was that of the Boneses to the affidavit of R.T. Marland, Jr., a real estate broker and appraiser. Both parties also requested the district court take judicial notice of the trial record from *Keller, supra*.

In an order entered August 29, 2001, the district court (1) granted Agri Affiliates' motion for summary judgment and (2) dismissed the Boneses' counterclaim and overruled their motion for summary judgment. In its order, the district court began its analysis of the pending motions by observing that *Keller, supra*, established the existence of a binding contract between Keller and the Boneses and that if the record did not support the Boneses' defenses, Agri Affiliates was entitled to its 6-percent commission. In reviewing the defenses alleged by the Boneses, the court initially considered the defense of negligent misrepresentation. Citing *Simon v. Wilkinson Agency*, 2 Neb. App. 877, 518 N.W.2d 154 (1994), the court concluded that since Nebraska did not recognize a claim for negligent misrepresentation in a real estate context, that defense would not be considered in analyzing the pending motions.

Next, after setting forth the elements of fraudulent misrepresentation, the court determined the evidence showed that Lydic Brothers had never made an offer to purchase the property at the list price. Therefore, the court reasoned, the statement by Johnson that Lydic Brothers was not interested in purchasing the property was not false, but "[i]n fact it was [a] truthful representation." Finally, the court determined the evidence established that Agri Affiliates appropriately marketed the property and used due diligence in finding a buyer, including notifying the tenant, Lydic

Brothers, and that therefore, Agri Affiliates had not breached any fiduciary duty it owed to the Boneses. The court then entered judgment for Agri Affiliates in the sum of \$29,400 plus interest, overruled the Boneses' motion for summary judgment, and dismissed their counterclaim.

ASSIGNMENTS OF ERROR

The Boneses assign, rephrased and renumbered, that the district court erred in (1) holding they could not raise the defense of negligent misrepresentation, (2) finding there was no genuine issue of material fact as to their allegations of fraudulent misrepresentation, (3) finding there was no genuine issue of material fact as to their allegations of breach of fiduciary duty, (4) granting Agri Affiliates' motion for summary judgment and entering judgment in favor of Agri Affiliates, (5) overruling their motion for summary judgment and dismissing their counterclaim, and (6) considering Marland's affidavit in granting Agri Affiliates' motion for summary judgment.

STANDARD OF REVIEW

[1,2] Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Herrera v. Fleming Cos.*, ante p. 118, 655 N.W.2d 378 (2003). In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Finch v. Farmers Ins. Exch.*, ante p. 277, 656 N.W.2d 262 (2003).

ANALYSIS

RECOGNITION OF NEGLIGENT MISREPRESENTATION CLAIM

In their first assignment of error, the Boneses argue that the district court erred in refusing to consider their defense of negligent misrepresentation. The district court's order states:

One of the defenses asserted by the Defendants is that of negligent misrepresentation. However, the Nebraska Court

of Appeals has clearly held in the decision of *Simon v. Wilkinson Agency, Inc.*, 2Neb.App. 877, 518 N.W.2d 154 (1994) that the claim of negligent misrepresentation has been recognized in Nebraska only in the context of the relationship between an insured and his or her agent.

[3,4] Neither the district court nor the parties to this action discuss this court's decision in *Gibb v. Citicorp Mortgage, Inc.*, 246 Neb. 355, 518 N.W.2d 910 (1994), decided approximately 1 month after *Simon v. Wilkinson Agency*, 2 Neb. App. 877, 518 N.W.2d 154 (1994). *Gibb* involved a purchaser of real estate who sued his real estate agency on, inter alia, a theory of negligent misrepresentation. In reversing the order of the district court sustaining Citicorp Mortgage's demurrer, we recognized *Gibb's* negligent misrepresentation theory of recovery as a viable basis of liability in the context of a real estate purchase and specifically adopted the definition of negligent misrepresentation found in the Restatement (Second) of Torts § 552 (1977). In the present case, the district court's determination that such "claim of negligent misrepresentation has been recognized in Nebraska only in the context of the relationship between an insured and his or her agent" was error. See, also, *NECO, Inc. v. Larry Price & Assocs.*, 257 Neb. 323, 597 N.W.2d 602 (1999) (reversing summary judgment in favor of vendor, finding that genuine issues of material fact existed as to whether statute of limitations had expired on buyer's claims of fraudulent and negligent misrepresentation with regard to whether building would contain complete sprinkler system). To the extent *Simon, supra*, holds otherwise, it is overruled. Finding such error, however, does not end our inquiry, as error without prejudice provides no ground for appellate relief. See *King v. Crowell Memorial Home*, 261 Neb. 177, 622 N.W.2d 588 (2001). Whether prejudicial error resulted from the trial court's failure to consider our holding in *Gibb, supra*, will be reviewed in conjunction with our consideration of the Boneses' second assignment of error.

ANALYSIS OF MISREPRESENTATION CLAIMS

In their second assignment of error, the Boneses contend the district court erred in failing to find a genuine issue of material

fact with regard to their claim of fraudulent misrepresentation. The Boneses contend Johnson's statement that Lydic Brothers was not interested in purchasing the real estate was known to be false and that therefore Agri Affiliates engaged in fraudulent misrepresentation.

[5] To recover on a fraudulent misrepresentation claim, one must show:

(1) that a representation was made; (2) that the representation was *false*; (3) that when made, the representation was known to be false or made recklessly without knowledge of its truth and as a positive assertion; (4) that it was made with the intention that [it] should [be relied] upon . . . ; (5) that the [party] reasonably did so rely; and (6) that he or she suffered damage as a result.

(Emphasis supplied.) *Gibb*, 246 Neb. at 360, 518 N.W.2d at 916.

[6,7] To recover on a negligent misrepresentation claim, one must demonstrate, inter alia, that

"[o]ne who, in the course of his business, profession, or employment, or in any other transaction in which he has a pecuniary interest, supplies *false information* for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information."

(Emphasis supplied.) *Gibb v. Citicorp Mortgage, Inc.*, 246 Neb. 355, 370, 518 N.W.2d 910, 921 (1994). This court has concluded that

the difference between fraudulent misrepresentation and negligent misrepresentation is the duty required in each claim. In fraudulent misrepresentation, one becomes liable for breaching the general duty of good faith or honesty. However, in a claim of negligent misrepresentation, one may become liable even though acting honestly and in good faith if one fails to exercise the level of care required under the circumstances.

Id. at 371, 518 N.W.2d at 921. There is, however, a similarity between the two in that a necessary element of both is a showing that the statement was false. As a result, the initial inquiry into

whether the statement by Johnson was a misrepresentation is the same under either a negligent or a fraudulent misrepresentation framework, and we will consider them together.

Viewing the evidence in a light most favorable to the Boneses, and giving to them the benefit of all reasonable inferences deducible from the evidence, we determine the record contains no evidence that the statement made by Johnson regarding Lydic Brothers' interest in the property was false. In his testimony, Johnson stated that he had two telephone conversations with Lydic in July. Specifically, Johnson testified:

[The Boneses' counsel:] Do you remember the dates of the two phone conversations with Don Lydic?

A. No, sir. I can't quote them to you.

Q. But they were in late June or — or July of 1997?

A. I believe they were both in July.

...

Q. The first phone conversation you had, what if anything do you remember about that conversation?

A. Just that I told him [Lydic] I knew that he and his brothers were the tenants on there and that we had activity on it and if he wanted to do anything please let us know or let the Boneses know. We needed to know what his intentions were.

Q. What do you recall his response being if any?

A. His response was "At that price we're not interested."

Q. And what price was that?

A. The \$490,000.

Q. So you called him later in July then. Do you remember when that conversation was?

A. It was just prior to the Keller offer and I was telling him once again that I was in the process to go visit with a person I thought was going to make a very good offer and was he interested, and that's when he told me I believe that they had already made an offer on the property and they were not interested in making a higher offer at that time. They thought the price was too high.

Q. [Lydic] told you they had already made an offer on the property?

A. \$190 an acre.

Q. And who had they made that offer to?

A. The Boneses.

...

Q. Why didn't you call him after you had the \$490,000 offer?

A. Because immediately prior to that offer he had completely rejected it. They were not going to make an offer. I had no reason to call him back.

There is no genuine issue of material fact in the record which refutes Johnson's assertion. With respect to the first telephone conversation in which it is claimed Lydic said that "[a]t that price we're not interested," the record is devoid of evidence raising any inference that Lydic did not make such a statement to Johnson. With respect to the second conversation occurring "just prior to the Keller offer," Lydic's version of that same telephone conversation was as follows:

[Lydic:] He told me he was on his way to a guy who said he would sign a, or, he said "I'm on my way to see a guy that says he will give the full price."

Q And you knew from receiving Exhibit 36 and Exhibit 12 that the full price meant at least \$245 an acre, is that right?

A It would be the \$245 an acre.

The record discloses that Lydic's response to this second telephone conversation was simply, "'Loren, that's a lot of money, you know.'" While it is true that Lydic testified he "thought" he would have the opportunity to match any offer made on the property, the record shows such "thought" was the result of a letter received from Audrey. The record does not contain evidence, even when viewed in a light most favorable to the Boneses, that anyone at Agri Affiliates made such representation to him. Furthermore, Lydic acknowledged that Lydic Brothers did not have a right of first refusal on the property.

The district court did not err in finding there was no genuine issue of material fact to support the Boneses' allegation that Agri Affiliates made a false representation to them. As there is no evidence in the record to indicate that the statement made by Johnson to the Boneses was false, the district court's error in failing to consider the Boneses' claim of negligent misrepresentation resulted

in no prejudice. There is no merit to the Boneses' second assignment of error.

BREACH OF FIDUCIARY DUTY

In their third assignment of error, the Boneses argue the district court erred in failing to find a genuine issue of material fact with regard to their allegation that Agri Affiliates had breached its fiduciary obligation. The Boneses contend that Agri Affiliates breached its fiduciary obligation in the following ways: (1) faxing a copy of the signed purchase agreement to Keller's attorney; (2) failing to inform the Boneses they were under no legal obligation to proceed with the sale to Keller, since no written communication of acceptance had been made to Keller; (3) failing to inform the Boneses of the difference in net proceeds due to the varying commissions; (4) failing to actively pursue a sale of the property to Lydic Brothers; and (5) making various misrepresentations to the Boneses.

[8] A real estate seller's agent has a duty:

- (a) To perform the terms of the written agreement made with the client;

- (b) To exercise reasonable skill and care for the client;

- (c) To promote the interests of the client with the utmost good faith, loyalty, and fidelity, including:

- (i) Seeking a price and terms which are acceptable to the client, except that the licensee shall not be obligated to seek additional offers to purchase the property while the property is subject to a contract for sale or to seek additional offers to lease the property while the property is subject to a lease or letter of intent to lease;

- (ii) Presenting all written offers to and from the client in a timely manner regardless of whether the property is subject to a contract for sale or lease or a letter of intent to lease;

- (iii) Disclosing in writing to the client all adverse material facts actually known by the licensee; and

- (iv) Advising the client to obtain expert advice as to material matters about which the licensee knows but the specifics of which are beyond the expertise of the licensee;

- (d) To account in a timely manner for all money and property received;

(e) To comply with all requirements of sections 76-2401 to 76-2430, the Nebraska Real Estate License Act, and any rules and regulations promulgated pursuant to such sections or act; and

(f) To comply with any applicable federal, state, and local laws, rules, regulations, and ordinances, including fair housing and civil rights statutes and regulations.

Neb. Rev. Stat. § 76-2417(1) (Reissue 1996). See, Neb. Rev. Stat. § 76-2429 (Reissue 1996); *Ruble v. Reich*, 259 Neb. 658, 611 N.W.2d 844 (2000) (recognizing that § 76-2417(1) supersedes common-law duties and responsibilities of parties to real estate agreement). The question is whether there is a genuine issue of material fact that Agri Affiliates' conduct breached any fiduciary obligation recognized in § 76-2417(1).

This court concluded in *Keller v. Bones*, 260 Neb. 202, 615 N.W.2d 883 (2000), that a binding contract existed between Keller and the Boneses for the sale of this real estate. As a result, the first two claims upon which the Boneses contend Agri Affiliates breached its fiduciary duties are controlled by our holding in *Keller*, *supra*. First, since we determined in *Keller*, *supra*, that a binding contract existed between the Boneses and Keller, Keller had a right to a copy of the agreement evidencing such purchase. Therefore, there can be no breach of fiduciary duty in faxing a copy to Keller's attorney. See § 76-2417(1)(e) (requiring compliance with Nebraska Real Estate License Act and Neb. Rev. Stat. § 81-885.24(20) (Reissue 1996) of such act, making failure to deliver copy of purchase agreement to both purchaser and seller unfair trade practice). Second, since our holding in *Keller*, *supra*, determined that the Boneses had legally accepted Keller's terms, there was a legal obligation on the Boneses' behalf to proceed with the sale to Keller. There is no merit to the Boneses' first two assertions that Agri Affiliates breached a fiduciary duty owed to them.

The remainder of the Boneses' allegations are similarly unsupported by the record. The Boneses' third assertion claims that Agri Affiliates breached its fiduciary duty by failing to inform them of the difference in net proceeds due to the varying commissions in the reservation clause. The reservation clause reads: "Seller reserves current Tenant from this listing for six (6)

months from date of Seller's signature. If Tenant is successful buyer within said six months, Broker will close the sale and receive 1% commission." The record is undisputed that the reservation clause and "split sales commission" was an amendment to Agri Affiliates' usual listing agreement specifically requested by the Boneses. The record further shows that after Agri Affiliates prepared the reservation clause, the Boneses were given an opportunity to have it reviewed by their attorney, and, as Calvin testified: "I think I may have had [an attorney] from Council Bluffs review it. Q. He's your — an attorney? A. He's an attorney. Q. That does work for you? A. Yes." The reservation clause was inserted at the Boneses' request and is not ambiguous. There is no genuine issue of material fact in the record to support the Boneses' claim of a fiduciary breach as set forth in their third assertion.

In their fourth assertion, the Boneses claim Agri Affiliates breached its fiduciary duty by failing to actively pursue a sale of the property to Lydic Brothers. Assuming without deciding that the listing agreement between the parties required such pursuit, we determine the record is similarly devoid of any evidence that Agri Affiliates failed in the manner claimed by the Boneses. After the listing agreement was signed, the record is again undisputed that on at least two occasions, representatives of Agri Affiliates advised Lydic Brothers of offers received on the property. Regarding such occasions, Lydic testified:

[The Boneses' counsel:] Backing up to the call you got from Mike Polk, at that time when he told you he had an offer for \$220 an acre do you remember what your response to him was?

A I told him I think that we were interested in it, but why, you know, should [we] bid against ourselves or, that's what I remember, again, you know.

Q Did he tell you whether or not he would be calling you back about the property?

A No.

Q Did you ask him to call you back if there was any more activity?

A Not that I recollect.

....

[Agri Affiliates' counsel:] All right. And then you got another call, at least one other call, from Loren Johnson on July 17th telling you that he's about to get a signed offer for the full price, didn't you?

A Now, this was like the 12th, or he was the first person that called.

Q I'm sorry?

A Mike Polk would have called first.

Q Okay. Mike Polk called. Then you got a call from Loren where he's out on the place?

....

A Yes.

....

Q Well, let me ask this. At any time when you had a conversation with Loren Johnson did you say, "I'll match any offer you get?" Did you ever say that?

A I didn't know I was supposed to.

Q Just answer the question, sir. Did you say that at any time?

A No.

Contrary to the Boneses' allegation, the record shows that Agri Affiliates did pursue a sale of the property to Lydic Brothers. The Boneses assertion to the contrary is not supported by the evidence in this record or any reasonable inferences deducible therefrom.

Finally, the Boneses assert that Agri Affiliates breached its fiduciary duty by making various misrepresentations to them. Basically the Boneses argue in their brief that Agri Affiliates, through Johnson, (1) misrepresented Lydic Brothers' interest in purchasing the property and (2) further misrepresented that the Boneses would be obligated to pay a full 6-percent commission to Agri Affiliates even if the Boneses chose to not sell to Keller.

Having previously determined there is no evidence from which to conclude that Johnson's statement to the Boneses regarding Lydic Brothers' interest in purchasing the property was false, we now determine the Boneses first assertion is without merit.

[9] With respect to the Boneses' second assertion, this court has previously stated:

When the broker secures a prospective buyer who is ready, willing, and able to purchase the subject property, the person

who hired the broker has received the service for which he or she has contracted, and the broker's right to compensation cannot be impaired by either the subsequent inability or unwillingness of a purported owner to consummate the sale on the terms prescribed.

Marathon Realty Corp. v. Gavin, 224 Neb. 458, 462, 398 N.W.2d 689, 693 (1987) (citing *Wisnieski v. Coufal*, 188 Neb. 200, 195 N.W.2d 750 (1972)). Thus, even if Johnson did make such a representation, it would not be false, as Agri Affiliates, in accordance with the listing agreement, produced a ready, willing, and able buyer at the full listing price.

Viewing the evidence in a light most favorable to the Boneses and giving to them the benefit of all reasonable inferences deductible therefrom, we determine there is no evidence to support their assertion that the conduct of Agri Affiliates breached any fiduciary duty owed to them. See § 76-2417(1). There is no merit to the Boneses' third assignment of error.

DISTRICT COURT'S RULINGS ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

In their fourth and fifth assignments of error, the Boneses contend the district court erred in granting Agri Affiliates' motion for summary judgment and in overruling the Boneses' motion for summary judgment. Having previously determined that the district court did not err in granting Agri Affiliates' motion for summary judgment, we determine the Boneses fourth assignment of error is without merit.

In their fifth assignment of error, the Boneses assert the district court erred in failing to grant their motion for summary judgment on their counterclaim. The theory upon which the Boneses sought summary judgment was, in essence, the same as that espoused in opposing Agri Affiliates' motion. That is, as a result of Agri Affiliates' misrepresentation and breach of fiduciary duties, the Boneses were entitled to damages. Having previously considered the evidence as it relates to the Boneses' opposition to Agri Affiliates' motion, and determining, after viewing the evidence in a light most favorable to the Boneses, that the record does not support their assertions, we likewise determine the district court did not err in overruling the Boneses'

motion for summary judgment and in dismissing their counterclaim. The Boneses' fifth assignment of error is without merit.

AFFIDAVIT OF MARLAND

Finally, in their sixth assignment of error, the Boneses argue the district court erred in admitting and considering the affidavit of Marland. In his affidavit, Marland, who was Agri Affiliates' expert, stated that in his opinion, Agri Affiliates appropriately exposed and marketed the Boneses' property, used due diligence to find a buyer at the full listing price and, in fact, found such a buyer in Keller. Marland further opined that "there was no misrepresentation or breach of fiduciary duty on the part of [Agri Affiliates] in its representation of the [Boneses]."

[10] The Boneses contend that Marland's affidavit violated Neb. Rev. Stat. § 25-1334 (Reissue 1995) in that it was not based upon personal knowledge and included both hearsay and legal conclusions. Section 25-1334 states that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify as to the matters stated therein."

In their brief, the Boneses assert the following: "While [Agri Affiliates] may rely on the Marland affidavit to oppose [the Boneses'] Motion for Summary Judgment, the Court inappropriately relied on the affidavit in granting summary judgment in favor of [Agri Affiliates]." Brief for appellants at 32. Thus, this court is concerned only with the district court's reliance on this affidavit with respect to its granting of Agri Affiliates' motion for summary judgment and not with respect to the overruling of the Boneses' motion.

[11] Ordinarily, the erroneous admission of evidence in a summary judgment hearing is not reversible error if other relevant evidence, admitted without objection or properly admitted over objection, sustains the trial court's necessary factual findings. *Stiver v. Allsup, Inc.*, 255 Neb. 687, 587 N.W.2d 77 (1998).

Assuming, arguendo, that the district court did improperly admit and rely upon Marland's affidavit in granting Agri Affiliates' motion for summary judgment, such is not prejudicial error requiring reversal. This court has already concluded,

without reliance on Marland's affidavit, that the record is sufficient to sustain the district court's granting of summary judgment in favor of Agri Affiliates. The Boneses' sixth assignment of error is without merit.

CONCLUSION

The judgment of the district court is affirmed.

AFFIRMED.

MARGARET DILLION, APPELLANT, V.
CHRISTOPHER MABBUTT, APPELLEE.
660 N.W.2d 477

Filed May 2, 2003. No. S-02-558.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.
2. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. **Statutes: Pleadings: Dismissal and Nonsuit: Words and Phrases.** The language of Neb. Rev. Stat. § 25-217 (Reissue 1995) providing for dismissal of unserved petitions is self-executing and mandatory.
4. **Limitations of Actions: Dismissal and Nonsuit: Jurisdiction.** After dismissal of an action by operation of law under Neb. Rev. Stat. § 25-217 (Reissue 1995), there is no longer an action pending and the district court has no jurisdiction to make further order except to formalize the dismissal.
5. **Dismissal and Nonsuit.** If orders are made following a dismissal under Neb. Rev. Stat. § 25-217 (Reissue 1995), they are a nullity, as are subsequent pleadings.

Appeal from the District Court for Lincoln County: DONALD E. ROWLANDS II, Judge. Appeal dismissed.

Jeffrey F. Putnam, of Inserra & Kelley, for appellant.

Mark Kadi, of Leininger, Smith, Johnson, Baack, Placzek, Steele & Allen, for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

After more than 6 months had passed since the appellant, Margaret Dillion, had filed her petition, the court determined that Dillion's attempts to serve the appellee, Christopher Mabbutt, had been ineffective. The court sustained Mabbutt's special appearance. Dillion filed a motion for a new trial. The court overruled the motion and dismissed the case without prejudice. More than 30 days after the court had sustained the special appearance, but less than 30 days after the court had overruled the motion for a new trial, Dillion appealed.

We determine that under Neb. Rev. Stat. § 25-217 (Reissue 1995), the case was automatically dismissed as a result of the court's determination that Dillion had failed to serve Mabbutt within 6 months of the date the petition was filed. The dismissal was formalized when the court sustained Mabbutt's appearance, and Dillion's motion for a new trial was a nullity that did not terminate the time for filing her notice of appeal. Because Dillion's notice of appeal was not filed within 30 days of the order sustaining Mabbutt's special appearance, we dismiss for lack of jurisdiction.

BACKGROUND

On August 29, 2001, Dillion filed a petition alleging that on September 3, 1997, she suffered injuries in a car accident that was caused by Mabbutt's negligence. Dillion moved for alternate service by publication, and the district court ordered that service be made by publication once a week for 4 successive weeks in the North Platte Telegraph newspaper.

A legal notice was first published on January 10, 2002, and ran for 4 successive weeks, concluding on January 31. The notice stated that "unless you answer the plaintiff's Petition on or before the 31st day of February [sic], judgment will be rendered against you." (Emphasis in original.)

On March 12, 2002, Mabbutt entered a special appearance challenging the court's jurisdiction over him. He claimed that service had been defective because the publication notice incorrectly identified his answer date. The court sustained the special appearance on April 8.

After the court had sustained the special appearance, Dillion filed what she characterized as a motion for a new trial under

Neb. Rev. Stat. § 25-1142(6) (Cum. Supp. 2002). The court denied Dillion's motion for a new trial and dismissed the case in a journal entry filed on May 13. On May 20, Dillion filed her notice of appeal.

ASSIGNMENTS OF ERROR

Dillion assigns, rephrased and consolidated, that the court erred in (1) finding that the defect in service by publication was not a mere technical error, (2) determining that the petition should be dismissed under § 25-217, and (3) not allowing Mabbutt to answer under Neb. Rev. Stat. § 25-822 (Reissue 1995) (now repealed by 2002 Neb. Laws, L.B. 876 (operative January 1, 2003)).

STANDARD OF REVIEW

[1] A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision. *Fischer v. Cvitak*, 264 Neb. 667, 652 N.W.2d 274 (2002).

ANALYSIS

[2] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *State v. Bellamy*, 264 Neb. 784, 652 N.W.2d 86 (2002). To determine whether we have jurisdiction, we must examine § 25-217.

At the time the court dismissed the case, § 25-217 provided that an "action shall stand dismissed without prejudice as to any defendant not served within six months from the date the petition was filed." In overruling the motion for a new trial, the court noted that more than 6 months had passed since Dillion had filed her petition and questioned whether, given its previous ruling that service had been ineffective, it had jurisdiction.

[3,4] The language of § 25-217 providing for dismissal of unserved petitions is self-executing and mandatory. *Kovar v. Habrock*, 261 Neb. 337, 622 N.W.2d 688 (2001); *Vopalka v. Abraham*, 260 Neb. 737, 619 N.W.2d 594 (2000). After dismissal of an action by operation of law under § 25-217, there is no longer an action pending and the district court has no jurisdiction to

make further orders except to formalize the dismissal. *Id.* By the time the court had sustained Mabbutt's special appearance, more than 6 months had passed since Dillion had filed her petition. Thus, the court's ruling that Mabbutt had not been served triggered § 25-217, and the order sustaining Mabbutt's special appearance had the effect of formalizing the dismissal of the case.

Because the order sustaining Mabbutt's special appearance formalized the dismissal, it serves as the final order. To appeal the decision, Dillion had to file her notice of appeal within 30 days of the time the order was file stamped on April 8, 2002. See Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2002). Dillion did not file her notice of appeal until May 20, well after the appeal period had passed.

[5] We note that Dillion filed a motion for a new trial after the April 8, 2002, order and that generally the filing of a motion for a new trial terminates the running of the appeal period. § 25-1912(1). However, if orders are made following a dismissal under § 25-217, they are a nullity, as are subsequent pleadings. *Kovar, supra*; *Vopalka, supra*. Thus, Dillion's motion for a new trial and the court's May 13 journal entry addressing it were nullities, and the motion did not terminate the running of the 30 days within which Dillion had to file her notice of appeal. As a result, Dillion's notice of appeal was untimely and we lack jurisdiction.

CONCLUSION

Because Dillion's notice of appeal was filed more than 30 days after the entry of judgment, we lack jurisdiction. Accordingly, the appeal is dismissed.

APPEAL DISMISSED.

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 571,
APPELLEE, v. CITY OF PLATTSMOUTH, APPELLANT.

660 N.W.2d 480

Filed May 2, 2003. No. S-02-581.

1. **Commission of Industrial Relations: Appeal and Error.** Any order or decision of the Commission of Industrial Relations may be modified, reversed, or set aside by an

appellate court on one or more of the following grounds and no other: if the commission acts without or in excess of its powers, if the order was procured by fraud or is contrary to law, if the facts found by the commission do not support the order, and if the order is not supported by a preponderance of the competent evidence on the record considered as a whole.

2. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the decision made by the court below.
3. **Statutes: Legislature: Intent.** In reading a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
4. **Commission of Industrial Relations: Federal Acts: Statutes: Public Policy.** When the Commission of Industrial Relations finds that a party has violated the Industrial Relations Act, Neb. Rev. Stat. §§ 48-819.01 and 48-825(2) (Reissue 1998) grant the commission authority to issue such orders as it may find necessary to provide adequate remedies to the parties to effectuate the public policy enunciated in Neb. Rev. Stat. § 48-802 (Reissue 1998).
5. **Commission of Industrial Relations: Labor and Labor Relations: Administrative Law.** The Commission of Industrial Relations has authority to enter orders preserving the status quo until a dispute is resolved.

Appeal from the Nebraska Commission of Industrial Relations.
Affirmed.

Roger K. Johnson for appellant.

Thomas F. Dowd, of Dowd & Dowd, for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN,
McCORMACK, and MILLER-LEMAN, JJ.

WRIGHT, J.

NATURE OF CASE

The International Union of Operating Engineers Local 571 (IUOE) filed a petition in the Commission of Industrial Relations (CIR) alleging that the City of Plattsmouth (Plattsmouth) had engaged in a prohibited practice in violation of the Industrial Relations Act (IRA) by failing to bargain in good faith over the effects of the elimination of a city department, which included the layoff of a bargaining unit employee. See Neb. Rev. Stat. § 48-824(1) (Reissue 1998). The CIR ordered Plattsmouth to cease and desist from unilaterally implementing changes in terms and conditions of employment which were mandatory subjects of bargaining, and it ordered the parties to commence good faith

negotiations. The CIR also ordered Plattsmouth to make the laid-off employee whole by compensating him with backpay until one of several conditions, including reinstatement, was met. Plattsmouth appeals.

SCOPE OF REVIEW

[1] Any order or decision of the CIR may be modified, reversed, or set aside by an appellate court on one or more of the following grounds and no other: if the commission acts without or in excess of its powers, if the order was procured by fraud or is contrary to law, if the facts found by the commission do not support the order, and if the order is not supported by a preponderance of the competent evidence on the record considered as a whole. *Crete Ed. Assn. v. Saline Cty. Sch. Dist. No. 76-0002*, ante p. 8, 654 N.W.2d 166 (2002).

[2] Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the decision made by the court below. *Keller v. Tavarone*, ante p. 236, 655 N.W.2d 899 (2003).

FACTS

In July 2001, the IUOE requested that Plattsmouth voluntarily recognize it as the bargaining representative for certain Plattsmouth employees working in four departments, including the Parks Department and the Street Department. On August 20, the Plattsmouth City Council voluntarily recognized the IUOE as the employees' collective bargaining representative. At a special meeting held on September 24, Plattsmouth eliminated its Parks Department and transferred the department's function to the newly created Street and Property Maintenance Department. In doing so, Plattsmouth laid off Randy Winters, who had been an employee of the Parks Department. The IUOE was Winters' recognized collective bargaining representative, and the layoff was completed without any bargaining over the effects of the reorganization of the departments.

The IUOE petitioned the CIR, alleging that Plattsmouth had violated § 48-824(1) by refusing to bargain in good faith over the effects of the elimination of the Parks Department. The IUOE sought reinstatement for Winters with backpay and asked that

Plattsmouth be ordered to engage in good faith collective bargaining with the IUOE concerning the layoff of bargaining unit employees. Plattsmouth admitted that it had eliminated the Parks Department and created the Street and Property Management Department. It also admitted that one full-time bargaining unit employee had been laid off. Plattsmouth alleged, however, that the IUOE had waived its right to bargain.

The CIR found that as a result of the reorganization of its departments, Plattsmouth had unilaterally decided to lay off a member of the recently organized bargaining unit. The CIR determined that no bargaining had occurred over the impact of this reorganization upon the membership of the bargaining unit. It also found that the evidence did not support a waiver of the IUOE's right to bargain and that Plattsmouth's failure to bargain over the effects of the reorganization was a prohibited practice as defined by § 48-824(1).

Relying upon various decisions of the National Labor Relations Board (NLRB) for guidance, the CIR ordered Plattsmouth to make Winters whole by compensating him with backpay until one of several conditions, including reinstatement, was met. It further ordered Plattsmouth to cease and desist from unilaterally implementing changes in terms and conditions of employment which were mandatory subjects of bargaining. It also ordered the parties to commence good faith negotiations over the changes. Plattsmouth timely appealed.

ASSIGNMENTS OF ERROR

Plattsmouth assigns, restated, that the CIR erred (1) in ordering it to reinstate Winters and (2) in ordering it to pay Winters backpay in a manner consistent with an award issued by the NLRB pursuant to the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. (2000).

ANALYSIS

The issue presented is whether the CIR acted in excess of its powers when it ordered that Winters be reinstated with backpay in order to remedy the prohibited practice in violation of § 48-824(1). Plattsmouth does not challenge the CIR's determination that it engaged in a prohibited practice.

Our scope of review provides that any order or decision of the CIR may be modified, reversed, or set aside by an appellate court on one or more of the following grounds and no other: if the commission acts without or in excess of its powers, if the order was procured by fraud or is contrary to law, if the facts found by the commission do not support the order, and if the order is not supported by a preponderance of the competent evidence on the record considered as a whole. *Crete Ed. Assn. v. Saline Cty. Sch. Dist. No. 76-0002*, ante p. 8, 654 N.W.2d 166 (2002). Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the decision made by the court below. *Keller v. Tavarone*, ante p. 236, 655 N.W.2d 899 (2003).

Based upon our scope of review, we must determine whether the CIR acted without or in excess of its powers. See *Crete Ed. Assn. v. Saline Cty. Sch. Dist. No. 76-0002*, supra. In order to make such determination, we are required to examine the provisions of the IRA independently of the determination made by the court below. See *Keller v. Tavarone*, supra.

Plattsmouth contends that the CIR's statutory authority cannot be expanded beyond that which is provided by the Legislature. It claims that the CIR's reliance upon various decisions of the NLRB was misplaced because the CIR does not have the same statutory powers as the NLRB.

The IUOE refers this court to various NLRB decisions which have held that where there has been a failure to bargain prior to a layoff, the appropriate remedy under the NLRB is reinstatement of the affected employees with backpay until the employer has fulfilled its bargaining obligation. The IUOE argues that we must look to the decisions of the NLRB for guidance in resolving this issue because the IRA and the NLRA have similar provisions.

We have previously held that decisions of the NLRB provide guidance and are helpful to the CIR in resolving issues where there are similar provisions. See *Nebraska Pub. Emp. v. Otoe Cty.*, 257 Neb. 50, 595 N.W.2d 237 (1999). The CIR obtains its power and authority from state law, whereas the NLRB obtains its power and authority from the NLRA. The IUOE argues that the federal counterpart to § 48-824(1) is 29 U.S.C. § 158(a), which provides:

“It shall be an unfair labor practice for an employer . . . (5) to refuse to bargain collectively with the representatives of his employees”

Although the NLRA and the IRA contain similar provisions, the NLRA specifically provides that reinstatement with or without backpay is a remedy for an unfair labor practice. See 29 U.S.C. § 160(c). The IRA does not specifically provide for such a remedy. Therefore, the decisions of the NLRB are not helpful to our analysis on this issue.

Plattsmouth also argues that the present action is not an “industrial dispute” because it involves only one employee and that, therefore, the CIR had no authority to enter an order of reinstatement with backpay. Brief for appellant at 28. Plattsmouth relies upon *Nebraska Dept. of Roads Employees Assn. v. Department of Roads*, 189 Neb. 754, 205 N.W.2d 110 (1973), in which we held that a uniquely personal termination of employment did not constitute an industrial dispute within the purview of the IRA. However, *Nebraska Dept. of Roads Employees Assn.* does not control our decision.

Neb. Rev. Stat. § 48-810 (Reissue 1998) gives the CIR jurisdiction over “industrial disputes” and “other disputes as the Legislature may provide.” An industrial dispute is defined as “any controversy concerning terms, tenure, or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, or refusal to discuss terms or conditions of employment.” Neb. Rev. Stat. § 48-801(7) (Reissue 1998). In its petition, the IUOE alleged that Plattsmouth had violated § 48-824(1) by failing to negotiate in good faith with respect to a mandatory topic of bargaining. Thus, the matter at issue was an industrial dispute as defined in § 48-801(7). Furthermore, Neb. Rev. Stat. § 48-825 (Reissue 1998) allows a party alleging a violation of § 48-824 to bring a complaint in the CIR and gives the CIR authority to order an appropriate remedy for such violation. We therefore conclude that the CIR had jurisdiction to hear this complaint and to order a proper remedy.

Plattsmouth next argues that the CIR has only those powers specifically set forth in the IRA. It argues that unlike the powers and authority provided to the Nebraska Equal Opportunity

Commission by the Nebraska Fair Employment Practice Act, Neb. Rev. Stat. § 48-1101 et seq. (Reissue 1998), the powers and authority provided to the CIR by Neb. Rev. Stat. § 48-809 (Reissue 1998) do not include the power or authority to enter an order for reinstatement with backpay. Plattsmouth also contends that the CIR has no authority to award damages.

In response, the IUOE refers this court to *IAFF Local 831 v. City of No. Platte*, 215 Neb. 89, 337 N.W.2d 716 (1983), in which we recognized a general grant of authority to the CIR to fashion necessary and appropriate remedies. In *IAFF Local 831*, we held that the CIR had authority to award interest on wages when it had ordered a wage rate as part of an industrial dispute over an appropriate wage to be paid to the employees. Although there was no specific language in the IRA granting the CIR authority to order payment of interest, we nevertheless affirmed the award of interest.

The IUOE asserts that the CIR has authority pursuant to § 48-825 and Neb. Rev. Stat. §§ 48-819.01 and 48-823 (Reissue 1998) to fashion an appropriate and necessary remedy to rectify the unfair and prohibited labor practices of Plattsmouth.

[3] In reading a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *First Data Corp. v. State*, 263 Neb. 344, 639 N.W.2d 898 (2002). Neb. Rev. Stat. § 48-816(1) (Reissue 1998) provides in part:

In the event of an industrial dispute between an employer and an employee or a labor organization when such employer and employee or labor organization have failed or refused to bargain in good faith concerning the matters in dispute, the commission may order such bargaining to begin or resume, as the case may be, and may make any such order or orders as may be appropriate to govern the situation pending such bargaining.

The IRA also provides that upon a finding by the CIR that a party has committed a prohibited practice in violation of § 48-824, § 48-825(2) authorizes the CIR to order an appropriate remedy. See *Crete Ed. Assn. v. Saline Cty. Sch. Dist. No. 76-0002*, ante p. 8, 654 N.W.2d 166 (2002). Section 48-825(2) provides:

The commission shall file its findings of fact and conclusions of law. If the commission finds that the party accused has committed a prohibited practice, the commission, within thirty days after its decision, shall order an appropriate remedy. Any party may petition the district court for injunctive relief pursuant to the rules of civil procedure.

Section 48-819.01 provides:

Whenever it is alleged that a party to an industrial dispute has engaged in an act which is in violation of any of the provisions of the Industrial Relations Act, or which interferes with, restrains, or coerces employees in the exercise of the rights provided in such act, the commission shall have the power and authority to make such findings and to enter such temporary or permanent orders as the commission may find necessary to provide adequate remedies to the injured party or parties, to effectuate the public policy enunciated in section 48-802, and to resolve the dispute.

Furthermore, § 48-823 provides:

The Industrial Relations Act and all grants of power, authority, and jurisdiction made in such act to the commission shall be liberally construed to effectuate the public policy enunciated in section 48-802. All incidental powers necessary to carry into effect the Industrial Relations Act are hereby granted to and conferred upon the commission.

It is apparent from a review of the language of the IRA that the Legislature has provided the CIR with general authority to order an appropriate remedy.

From the above pronouncements of legislative authority, we must determine how much power and authority the Legislature intended to grant the CIR in order to provide an appropriate remedy to an injured party or parties.

Plattsmouth argues that the CIR's order of reinstatement with backpay was not an appropriate remedy and therefore exceeded the authority given to the CIR by law. It contends that §§ 48-819.01 and 48-825 grant the CIR authority to order an appropriate remedy only as it relates to the issue of bargaining but not to the award of damages. Plattsmouth also claims that Winters was not a party to the action and that, therefore, the CIR had no authority to award damages to him.

In *IAFF Local 831 v. City of No. Platte*, 215 Neb. 89, 337 N.W.2d 716 (1983), we pointed out that § 48-819.01 was enacted as a result of our decision in *University Police Officers Union v. University of Nebraska*, 203 Neb. 4, 277 N.W.2d 529 (1979) (superseded by statute as stated in *IAFF Local 831 v. City of No. Platte*, *supra*). In *University Police Officers Union*, we held that the CIR had no authority “to make findings with regard to unfair labor practices or direct a public employer to take any more action than is necessary to preserve and protect the status of the parties’ property and public interest involved pending final determination of the issues.” 203 Neb. at 17-18, 277 N.W.2d at 537. We recognized the authority granted to the CIR by § 48-819.01 to enter such orders as it may find necessary to provide adequate remedies to effectuate the public policy and to resolve the dispute.

In *Transport Workers v. Transit Auth. of Omaha*, 216 Neb. 455, 344 N.W.2d 459 (1984), the issue was whether the CIR had authority to enter temporary orders concerning wages, hours, and terms and conditions of employment while the CIR was attempting to resolve a labor dispute pending before it. The trial court had concluded that the CIR’s authority was limited to restraining the employer from firing the employee. We reversed, and concluded that if the CIR had authority to make temporary orders to protect the status of the parties, it obviously must have had authority to do something more than simply make sure that the employer did not fire the employee. We held that the IRA granted the CIR “discretionary authority, when it appears appropriate, to order that the status quo of the parties be retained until the dispute is resolved.” *Id.* at 461, 344 N.W.2d at 463. We stated:

It may very well be that it is in the public interest to be assured that public employees, who do not have the right to strike or hinder, delay, limit, or suspend the continuity or efficiency of governmental services, should continue to receive their previous salaries or be afforded the same terms and conditions of employment while the employer, the employee, and the CIR attempt to resolve the differences.

Id. at 458-59, 344 N.W.2d at 462.

In *Transport Workers*, we noted that the authority of the CIR is limited to that granted by the Legislature and must be narrowly construed. However, the Legislature has stated in § 48-823 that all

grants of power, authority, and jurisdiction shall be liberally construed to effectuate the public policy.

The rationale in limiting the power and authority granted to the CIR is that the CIR is an administrative body and is not a court. Therefore, the exercise of power is based upon what is necessary to provide adequate remedies to effectuate the public policy and resolve the dispute. It is simply a question of how much authority an administrative body will be permitted to exercise in performing its quasi-judicial functions. The Legislature has left this for the courts to determine on a case-by-case basis.

[4] In *Crete Ed. Assn. v. Saline Cty. Sch. Dist. No. 76-0002*, ante p. 8, 30, 654 N.W.2d 166, 183 (2002), we stated that when the CIR finds that a party has violated the IRA, “§§ 48-819.01 and 48-825(2) grant the CIR authority to issue such orders as it may find necessary to provide adequate remedies to the parties to effectuate the public policy enunciated in § 48-802.” In *Crete Ed. Assn.*, the remedies fashioned by the CIR fell into two categories: (1) that the appellant cease and desist from certain actions and (2) that the appellant post notices informing employees that it had engaged in prohibited labor practices. We addressed the authority of the CIR under §§ 48-819.01 and 48-825, within the framework of identifying adequate and appropriate remedies. We concluded that the cease and desist orders issued by the CIR were adequate and appropriate but that the order requiring the posting of notices was not a proper remedy and therefore exceeded the CIR’s powers.

In the case at bar, the CIR’s order to cease and desist unilaterally implementing changes in the terms and conditions of employment is not at issue. We focus only on whether the order of reinstatement with backpay was an adequate and appropriate remedy and therefore within the authority of the CIR.

If the CIR finds that an accused party has committed a prohibited practice, it has the authority to order an appropriate remedy, see § 48-825(2), and such authority is to be liberally construed to effectuate the public policy enunciated in Neb. Rev. Stat. § 48-802 (Reissue 1998), see § 48-823. Since the Legislature has chosen not to specifically define the extent of the remedial authority granted to the CIR, the scope of such authority will be defined by the courts on a case-by-case basis.

Plattsmouth's failure to bargain over a mandatory subject of bargaining was a prohibited practice, and thus, the CIR had the authority to craft an appropriate remedy for the injured party. Although Winters was not named as a party, the IUOE properly represented him as his recognized collective bargaining representative. Therefore, he was an injured party for purposes of the IRA.

[5] We have previously determined that the CIR has authority to enter orders preserving the status quo until a dispute is resolved. See *Transport Workers v. Transit Auth. of Omaha*, 216 Neb. 455, 344 N.W.2d 459 (1984). Giving a liberal interpretation to the authority to effectuate the public policy of § 48-802, we determine that it was appropriate for the CIR to order the parties to return to the status quo following a finding of a prohibited practice under the IRA. Therefore, we conclude that the CIR had authority to order that Winters be reinstated to the position he held prior to Plattsmouth's prohibited actions and that the CIR did not act in excess of its powers when it ordered such reinstatement with backpay.

CONCLUSION

The CIR was correct in returning Winters to the status quo by ordering reinstatement and the payment of his normal wages from the date he was laid off less any net interim earnings. Such was an appropriate remedy under the facts of this case.

For the reasons set forth herein, we affirm the order of the CIR.

AFFIRMED.

RANDALL E. LANGEMEIER, APPELLEE, V.
URWILER OIL & FERTILIZER, INC., AND
CARDINAL MART, INC., APPELLANTS.

660 N.W.2d 487

Filed May 2, 2003. No. S-02-619.

1. **Specific Performance: Equity: Appeal and Error.** An action for specific performance sounds in equity, and on appeal, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent from the conclusion reached by the trial court.

2. **Specific Performance.** Specific performance is not generally demandable as a matter of absolute legal right but is addressed to the legal discretion of the court. It will not be granted where enforcement of the contract would be unjust.
3. _____. A party seeking specific performance must show his or her right to the relief sought, including proof that the party is ready, able, and willing to perform his or her obligations under the contract.
4. _____. The right to specific performance may be lost by abandonment of the contract and by conduct inconsistent with the right to relief.
5. **Specific Performance: Contracts: Property: Conveyances.** As a general rule, the vendor in a land contract who, subsequently to its execution, has conveyed a substantial part of the property covered by the contract to a third person who is a bona fide purchaser, cannot enforce specific performance of the contract to sell. Nor does he or she become entitled to specific performance by acquiring options to repurchase the land so conveyed.

Appeal from the District Court for Cedar County: MAURICE REDMOND, Judge. Judgment vacated, and cause remanded with directions to dismiss.

George H. Moyer and Mark A. Keenan, of Moyer, Moyer, Egley, Fullner & Warnemunde, for appellants.

Vince Kirby for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, STEPHAN, McCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

This case is before us for the second time. In *Langemeier v. Urwiler Oil & Fertilizer*, 259 Neb. 876, 613 N.W.2d 435 (2000) (*Langemeier I*), we held that the district court for Cedar County was without jurisdiction to determine whether Randall E. Langemeier (Langemeier) was entitled to specific performance of a real estate purchase agreement because of the absence of an indispensable party, Joan Langemeier (Joan), who was disclosed in the record as having an interest in the subject property. We therefore vacated the order of the district court which had granted Langemeier, as seller, specific performance of the agreement and compelled Urwiler Oil & Fertilizer, Inc. (Urwiler Oil), and Cardinal Mart, Inc. (collectively defendants), as buyers, to comply with its terms, and dismissed the appeal. Subsequently, Joan entered an appearance in the case and additional proceedings were held in the district court, after which the court again

ordered specific performance of the agreement. Defendants perfected this appeal from that order.

FACTS

LANGEMEIER I

The following facts were established by that portion of the record which was before us in *Langemeier I*, 259 Neb. at 877-80, 613 N.W.2d at 436-38, and are therefore reiterated from that opinion:

On June 27, 1995, Langemeier and Urwiler Oil entered into a purchase agreement for the following described real property: "That part of Outlot One (1) of Second Addition to the City of Randolph, Cedar County, Nebraska, described as follows: Beginning at the Northwest corner of Block 2, Second Addition; Thence North 134 feet to the point of beginning; Thence East at right angles 162 feet; Thence South at right angles 18 feet; Thence East at right angles 150 feet; Thence North at right angles 230 feet to the South line of Federal Highway No. 20; Thence Southwesterly along the South line of Federal Highway No. 20; Thence to a point where the East line of Cedar Street in the City of Randolph, as extended North, intersects the South line of Federal Highway No. 20; Thence South along the East line of Cedar Street to the point of beginning, all in the City of Randolph, Cedar County, Nebraska." Langemeier operated a convenience store on the foregoing described property, sometimes referred to as the "Mini Mart." The purchase agreement included all fixtures on the property together with all personal property "on premises on date of acceptance of [the purchase] agreement—list to be attached." The purchase agreement which appears in the record does not have attached to it a list identifying the personal property. The sale price was \$125,000, with a \$1,000 downpayment, leaving a purchase price balance of \$124,000. The sale was conditioned on Langemeier's having marketable title, in fee simple, and Langemeier's conveyance of title to Urwiler Oil by warranty deed "free and clear of all liens, encumbrances or special taxes levied or assessed."

Pursuant to the purchase agreement, Langemeier agreed to furnish to Urwiler Oil, within 15 days from the date of acceptance of the purchase agreement, either a complete, certified abstract of title or title insurance. Urwiler Oil agreed to deliver, 15 days thereafter, a copy of an attorney's opinion showing any defects in the title. Urwiler Oil further agreed under the purchase agreement to close the sale within 30 days of the delivery of the title abstract or title insurance, unless defects were found, or, in the event defects were found, within 10 days of the curing of such defects.

On June 19, 1995, a title insurance commitment was prepared on the subject property. The commitment listed several matters with regard to the title, summarized as follows:

(1) Langemeier and Vickie Langemeier were divorced on May 24, 1984, and Langemeier claimed to have been awarded the convenience store and the property on which it was situated in the divorce decree. The title insurance company required a quitclaim deed from Vickie Langemeier because the real property awarded to Langemeier in the Langemeiers' divorce decree was identified by only a general description and not by a legal description.

(2) On February 7, 1989, Rodney Zwygart had sued Langemeier, claiming to be Langemeier's business partner with an undivided one-half interest in the partnership's assets. In the lawsuit, Zwygart sought a division of partnership assets, which assets allegedly included the convenience store. The title insurance company refused to issue title insurance against the litigation, which litigation it considered an exception to title insurance because the litigation had not reached a judgment.

Counsel for Urwiler Oil received a copy of the title insurance commitment on or about June 20, 1995. No written attorney's opinion was sent to Langemeier by Urwiler Oil identifying title defects in the property that was the subject of the purchase agreement, although representatives of defendants testified that they had numerous conversations with Langemeier and his attorney about resolving the matters raised in the title insurance commitment, including the pending litigation case, *Zwygart v. Langemeier*, Cedar

County District Court, docket No. 29, page 45, which matters they believed created clouds on the title.

On August 4, 1995, Zwygart filed a notice of lis pendens. The notice set forth that Zwygart claimed an interest in the real estate described in the notice, which interest was the subject of the pending lawsuit between Zwygart and Langemeier. The notice contained a faulty legal description of the property which was the subject of the purchase agreement.

Cardinal Mart was incorporated as a Nebraska corporation on or about August 15, 1995. Of Cardinal Mart's three shareholders, two are also shareholders in Urwiler Oil. Cardinal Mart took possession of the real estate described in the purchase agreement on August 15 and began operating the convenience store. As of August 15, Langemeier ceased to operate or do business as the Mini Mart.

A closing on the purchase agreement was scheduled for August 18, 1995, but Langemeier did not appear at the closing because he understood it was cancelled due to the existing clouds on the title. Representatives of defendants, however, did appear at the scheduled closing. No closing took place on the purchase agreement on August 18 or subsequent thereto. In August and September, nominal payments were made by Cardinal Mart to Langemeier, which payments Cardinal Mart's representatives described as rent payments. Witnesses testified at trial that the parties continued to discuss the sale and the title matters during August, September, and October.

On October 17, 1995, defendants' counsel notified Langemeier by letter that defendants were rescinding their offer to purchase the property described in the purchase agreement. On November 22, counsel for defendants notified Langemeier that on November 22, defendants had terminated their day-to-day tenancy of the convenience store and had removed or assigned to Cardinal Mart all inventory.

On November 9, 1995, Langemeier filed his petition for specific performance of the purchase agreement against defendants. On December 1, 1998, and continuing on December 2, a bench trial was held on Langemeier's

amended petition filed on March 11, 1996, together with Urwiler Oil's second amended answer to the petition, filed June 22, and Cardinal Mart's fourth amended answer to the petition, filed August 27, 1998.

Langemeier admitted at trial on December 1, 1998, that he no longer owned the property described in the purchase agreement, which is the subject of the instant action, and that the property was owned by his mother, [Joan]. Langemeier testified, however, that he could carry out the terms of the purchase agreement and transfer title to the property the same day or the very next day. The record is unclear when Joan Langemeier acquired title to the property. Joan was not then a party to the case.

With respect to the divorce decree, Langemeier testified that on August 15, 1995, an order nunc pro tunc had been entered by the district court in the divorce action, which order identified the real property awarded to Langemeier under the divorce decree using legal descriptions, including the property on which the convenience store was located. The record suggests that the nunc pro tunc order may have been issued without notice to Vickie Langemeier.

With respect to the Zwygart litigation, Langemeier testified that the litigation was resolved in December 1995. The record does not contain evidence other than Langemeier's testimony that the Zwygart lawsuit has been concluded.

Other witnesses testified that subsequent to the filing of the petition for specific performance, a federal tax lien and a judgment lien had been placed on the real estate that was the subject of the purchase agreement. The record further indicates that a mortgage on the real estate had been foreclosed and that the property had been sold. . . . Langemeier [testified at the first trial that he] had redeemed the property from the foreclosure sale, evidently with funds supplied by his mother, [Joan].

SUBSEQUENT PROCEEDINGS

As noted above, in *Langemeier I*, we vacated the district court's order granting specific performance, based upon our determination that Joan was an indispensable party who had not been joined in the action. We concluded that "[i]n the absence of

an indispensable party, the district court is without jurisdiction to determine the controversy.” *Langemeier I*, 259 Neb. at 884, 613 N.W.2d at 440. Following issuance of our mandate, a “Voluntary Appearance and Consent to Judgment” was filed by Joan in which she stated that she is the record owner of the subject property and agreed that the district court “may enter judgment for or against the plaintiffs, and further agrees to be bound thereby as if made a party prior to the trial of this matter.”

At a subsequent hearing, the district court took judicial notice of the record made at the previous trial. Both parties submitted additional evidence. Joan testified that she is the mother of Langemeier. She testified that she is the owner of the subject property and that she obtained title to that property “in the court thing.” Joan testified that she obtained title by warranty deed. Joan was asked,

Would you be willing to give a warranty deed to whomsoever that specific performance is granted? Would you be willing and are you able to give a warranty deed, to execute a warranty deed, to that property whereby you would warrant the title to the defendant against all claims presently existing?

Joan answered “[y]es.” Defendants then offered evidence that the economic viability of the Mini Mart had significantly decreased since 1995.

On May 13, 2002, the district court entered an order granting Langemeier specific performance of the contract as written. The order stated that “upon payment of the sums due, the plaintiff shall furnish a warranty deed conveying the described property to the defendants or their order, as required by the Purchase Agreement.”

ASSIGNMENTS OF ERROR

Defendants assign that the trial court erred by (1) granting specific performance of the purchase agreement, (2) deciding that Langemeier’s title was marketable, (3) deciding that Langemeier had tendered performance of the contract for the sale of real estate, and (4) failing to find that it would be inequitable and unfair to compel specific performance nearly 7 years after performance was due from Langemeier.

STANDARD OF REVIEW

[1] An action for specific performance sounds in equity, and on appeal, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent from the conclusion reached by the trial court. *Langemeier I*; *Marten v. Staab*, 249 Neb. 299, 543 N.W.2d 436 (1996).

ANALYSIS

[2-4] In undertaking our independent review of the legal and factual issues presented in this appeal, we are guided by certain general principles. Specific performance is not generally demandable as a matter of absolute legal right but is addressed to the legal discretion of the court. It will not be granted where enforcement of the contract would be unjust. *James J. Parks Co. v. Lakin*, 206 Neb. 184, 292 N.W.2d 21 (1980); *Tedco Development Corp. v. Overland Hills, Inc.*, 200 Neb. 748, 266 N.W.2d 56 (1978). A party seeking specific performance must show his or her right to the relief sought, including proof that the party is ready, able, and willing to perform his or her obligations under the contract. *Id.* The right to specific performance may be lost by abandonment of the contract and by conduct inconsistent with the right to relief. *James J. Parks Co. v. Lakin, supra*; *Sofio v. Glissmann*, 156 Neb. 610, 57 N.W.2d 176 (1953).

In *Langemeier I*, we held that the absence of Joan as a party to the action was a jurisdictional defect which prevented the district court from reaching the merits of the controversy. Now that Joan has entered an appearance, we are presented with a substantive issue which we did not and could not reach in *Langemeier I*: whether an action for specific performance of a real estate purchase agreement will lie where, subsequent to the execution of the agreement, the seller has conveyed the property to a third party with whom the purchasers have no contractual relationship. In their brief, defendants argue that while Nebraska law is unclear on this point, the law of other jurisdictions resolves the issue in the negative.

Neither the parties' briefs nor our research has disclosed any controlling Nebraska authority on this point, although there is language in *James J. Parks Co. v. Lakin, supra*, which suggests

that conveyance to a third party by the seller may not absolutely preclude the remedy of specific performance against the purchaser under a contract. In that case, the plaintiff had purchased 303 acres of Arizona citrus grove from the defendant, subject to a repurchase agreement. Subsequently, the plaintiff sold an undivided one-half interest in the property to 11 investors, and at the same time, the defendant repurchased a one-eighth interest in the property. Approximately 5 years later, the plaintiff sought specific performance of the original repurchase agreement with respect to all of the property except that which the defendant had already repurchased. The district court denied the relief requested, in part because of a failure to join indispensable parties who were not identified in the record. In affirming, we stated:

The plaintiff has not acquired the interests of the other owners and the evidence does not show that he can acquire their interests. The rights of the other owners are involved in this action and a final determination could not be made without affecting their rights or leaving the controversy in such condition that the determination would be wholly inconsistent with equity and good conscience.

James J. Parks Co. v. Lakin, 206 Neb. at 189, 292 N.W.2d at 25.

[5] This language is susceptible to an interpretation that specific performance could be awarded if all persons having an interest in the property were made parties and jointly requested relief, or if the seller under the contract could prove that he or she was able to reacquire the portion of the property conveyed to third parties in order to perform on the contract with the purchaser. However, the language is at best dicta and is contrary to what we perceive as the majority rule in other jurisdictions. According to 71 Am. Jur. 2d *Specific Performance* § 147 at 151 (2001):

Since the vendor in a land contract is not entitled to compel the vendee's specific performance of the contract where the vendor has a defective title, he or she obviously is not entitled to the remedy of specific performance against the vendee where he or she has no title whatever. The vendor in a land contract who, subsequently to its execution, has conveyed a substantial part of the property covered by the contract to a third person who is a bona fide purchaser, cannot enforce specific performance of the contract to sell . . . Nor

does he or she become entitled to specific performance by acquiring options to repurchase the land so conveyed.

The circumstance in which a seller seeking specific performance asserts the ability to reacquire property conveyed to a third party in order to perform the original contract was addressed in *Suburban Improvement Co. v. Scott Lumber Co.*, 67 F.2d 335 (4th Cir. 1933). In that case, the defendant contracted to buy certain lots from the plaintiff. One of the provisions of the contract provided that the plaintiff could not sell any of the lots to any other person without the consent of the defendant. After the contract was executed, the plaintiff sold some of the lots to third parties. Prior to the time the plaintiff's action for specific performance was heard, the plaintiff obtained options from all persons to whom conveyance had been made and averred its ability to acquire title and make conveyance under the terms of the contract. Notwithstanding this, the court held that the plaintiff was not entitled to specific performance of the contract. The court reasoned that by conveying the lots, the plaintiff both rendered itself unable to perform the contract and violated one of the express provisions of the contract. The court further found that even if no express provision in the contract had been violated, "it has been repeatedly held that a vendor cannot enforce specific performance, where subsequent to the execution of the contract he has conveyed a substantial part of the property therein embraced to a third person." *Id.* at 338. In addressing whether the plaintiff's acquisition of the options to repurchase nevertheless placed it in a position to perform prior to the decree, the court held that any reacquisition of the property could not "wipe out" the breach of the contract that had already occurred. *Id.*

Other courts have held that a purchaser cannot be required to accept title from a third party, even if that title is valid. *Ross v. Kunkel*, 257 Wis. 197, 43 N.W.2d 26 (1950); *Marx v. King*, 193 Iowa 29, 186 N.W. 680 (1922). According to *Marx*, a "rule of general, if not universal, acceptance is that a purchaser cannot be required to accept a conveyance from a third person, even though a good title is thereby conveyed, unless it is so stipulated in the contract." 193 Iowa at 33, 186 N.W. at 682. *Ross* explains that this proposition is applied because "[t]he personal responsibility of the grantor may or may not become valuable to the grantee

in the event of a breach of the warranties or of the terms and conditions of the deed.’ ” 257 Wis. at 204, 43 N.W.2d at 30.

In the instant case, it is undisputed that Langemeier conveyed his interest in the subject property to Joan prior to the trial of this action. It is therefore unnecessary to decide the contested factual issue of whether Langemeier was able to perform his obligations under the purchase agreement prior to that conveyance, because he clearly was unable to do so after divesting himself of title. Joan was neither a party nor a third-party beneficiary of the purchase agreement and therefore has no standing to seek enforcement by specific performance. See *Marten v. Staab*, 249 Neb. 299, 543 N.W.2d 436 (1996). Moreover, defendants did not contract to purchase the subject property either directly or indirectly from Joan. We conclude that under these factual circumstances, Langemeier’s conveyance of the subject property to Joan was an act inconsistent with the purchase agreement which precludes the remedy of specific performance.

CONCLUSION

Based upon our de novo review of the record, we conclude that Langemeier is not entitled to specific performance of the real estate purchase agreement dated June 27, 1995, for the reasons discussed herein. The judgment of the district court is therefore vacated, and the cause is remanded with directions to dismiss the action.

JUDGMENT VACATED, AND CAUSE REMANDED
WITH DIRECTIONS TO DISMISS.

GERRARD, J., not participating.

JENNIFER MISEK, APPELLANT, V.
CNG FINANCIAL, APPELLEE.

660 N.W.2d 495

Filed May 2, 2003. No. S-02-876.

1. **Workers’ Compensation: Appeal and Error.** An appellate court may modify, reverse, or set aside a Workers’ Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record

to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.

2. **Workers' Compensation: Judgments: Appeal and Error.** Where there is no factual dispute, the question of whether the injury arose out of and in the course of employment is clearly one of law, in connection with which a reviewing court has an obligation to reach its own conclusions independent of those reached by the inferior courts.
3. **Workers' Compensation.** Neb. Rev. Stat. § 48-101 (Reissue 1998) compensates injury caused an employee by an accident arising out of and in the course of his or her employment.
4. **Workers' Compensation: Proof.** The two phrases "arising out of" and "in the course of" in Neb. Rev. Stat. § 48-101 (Reissue 1998) are conjunctive; thus, both must be established by a preponderance of the evidence.
5. **Workers' Compensation.** The test to determine whether an act or conduct of an employee which is not a direct performance of the employee's work "arises out of" his or her employment is whether the act is reasonably incident thereto, or is so substantial a deviation as to constitute a break in the employment which creates a formidable independent hazard.
6. _____. The "arising out of" employment requirement is primarily concerned with causation of an injury.
7. _____. All acts reasonably necessary or incident to the performance of the work, including such matters of personal convenience and comfort, not in conflict with specific instructions, as an employee may normally be expected to indulge in, under the conditions of his work, are regarded as being within the scope or sphere of the employment.
8. **Workers' Compensation: Words and Phrases.** The "in the course of" requirement of Neb. Rev. Stat. § 48-101 (Reissue 1998) has been defined as testing the work connection as to time, place, and activity; that is, it demands that the injury be shown to have arisen within the time and space boundaries of the employment, and in the course of an activity whose purpose is related to the employment.
9. _____. An injury is said to arise in the course of the employment when it takes place within the period of the employment, at a place where the employee reasonably may be, and while the employee is fulfilling work duties or engaged in doing something incidental thereto.
10. **Workers' Compensation.** If the employer, in all the circumstances, including duration, shortness of the off-premises distance, and limitations on off-premises activity during the interval, can be deemed to have retained authority over the employee, the off-premises injury may be found to be within the course of employment.
11. _____. Whether an injury arose out of and in the course of employment must be determined from the facts of each case.
12. **Workers' Compensation: Judgments: Appeal and Error.** Factual determinations made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong.

Appeal from the Nebraska Workers' Compensation Court.
Reversed and remanded with directions.

Casey J. Quinn for appellant.

Joseph W. Grant, of Gaines, Pansing & Hogan, for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, McCORMACK, and MILLER-LERMAN, JJ.

McCORMACK, J.

NATURE OF CASE

The sole issue presented in this appeal is whether an injury sustained by the appellant, Jennifer Misek, arose out of and in the course of her employment. A Nebraska Workers' Compensation Court trial judge determined that Misek's injury arose out of and in the course of her employment and awarded Misek benefits. A review panel of the compensation court reversed the award of the trial judge. We reverse the decision of the review panel and remand the cause with directions.

BACKGROUND

Misek was employed by "Check 'n Go," which was owned by CNG Financial. Her job duties included assisting customers at the front counter, answering telephones, photocopying and faxing documents, and running errands to the post office or bank. With no soft drinks available onsite, Misek would also occasionally leave to get soft drinks for herself and her coworkers, sometimes at her own request and sometimes at the request of her supervisor. Misek was not required to "clock out" in order to run these errands and was paid for her time.

Check 'n Go had no formal break policy in place. Misek testified that any break she took had to be approved by her supervisor and that she had never been told she could not take a break. Misek would not usually tell her supervisor precisely what she would be doing on her break. She also testified that she generally did not leave "the area" during her breaks.

While working at Check 'n Go on August 25, 2000, Misek asked her supervisor if she could go to a nearby convenience store and get a soft drink. Her supervisor said yes. Misek then asked her supervisor and coworker if they would like something from the convenience store as well. Each accepted the offer and gave money to Misek to buy them soft drinks. Misek exited out the back door of Check 'n Go, crossed a driveway, and started

walking down a grassy hill. About halfway down the hill, Misek slipped, fell, and broke her left ankle.

Misek filed a petition in the compensation court seeking compensation for her injury. A trial judge of the court entered an award in which the judge concluded that Misek's injury arose out of and in the course of her employment. The judge found:

[Misek]'s attempt to obtain soft drinks for herself, her supervisor and co-worker during a work break were matters of personal convenience and comfort not in conflict with her supervisors specific instructions that [Misek] would normally be expected to indulge in under the conditions of [Misek]'s work and that there was sufficient control exercised by [Misek]'s supervisor in acquiescing [sic] to [Misek]'s request to obtain soft drinks for the supervisor and all employees and as such the act arose out of and was within the course and scope of employment and compensable.

CNG Financial filed an application for review, seeking review of the trial judge's award by a review panel of the compensation court. CNG Financial claimed that the trial judge erred in (1) finding that Misek's injury arose out of and in the course of her employment, (2) determining that CNG Financial exercised no scrutiny of Misek's break activities, and (3) extending the rule of law regarding acts of personal comfort and convenience to activities which occurred off-premises and during a break period.

In a two-to-one decision, the review panel of the compensation court reversed the trial judge's award. The review panel noted that this court has consistently held that injuries which occur off the premises of the employer are generally not compensable, citing *La Croix v. Omaha Public Schools*, 254 Neb. 1014, 582 N.W.2d 283 (1998), and *Johnson v. Holdrege Med. Clinic*, 249 Neb. 77, 541 N.W.2d 399 (1996), while injuries occurring on the employer's premises are generally found to be compensable simply because of the situs of the injury, citing *Thomsen v. Sears Roebuck & Co.*, 192 Neb. 236, 219 N.W.2d 746 (1974). Applying these decisions, the review panel found that no recovery was possible where Misek was injured off CNG Financial's premises and where CNG Financial had no means to exercise control over Misek's actions while she was

gone. The review panel also found that the trial judge's reliance on the doctrine of matters of personal convenience and comfort was misplaced. The review panel concluded that

the trial court erred in its conclusion that [Misek]'s injury occurred while she was in the "course" of her employment with [CNG Financial]. A finding that an injury "arose out of" risks reasonably necessary or incident to the performance of [Misek]'s work is not sufficient in and of itself to sustain an award.

The dissenting judge on the review panel found that the cases cited by the majority were inapplicable to Misek's case and relied on several factually similar cases from other jurisdictions to arrive at the opposite conclusion. The judge also took exception to the majority's determination that CNG Financial had no opportunity or means to exercise authority over Misek when she was on her break. The judge said, "This is contrary to the finding of fact of the trial judge, who found that [CNG Financial] had sufficient control over [Misek] because [Misek] had to ask to take a break."

ASSIGNMENTS OF ERROR

Misek assigns, rephrased, that the review panel erred in finding that her injury did not arise out of and in the course of her employment.

STANDARD OF REVIEW

[1] An appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Zavala v. ConAgra Beef Co.*, ante p. 188, 655 N.W.2d 692 (2003).

[2] Where there is no factual dispute, the question of whether the injury arose out of and in the course of employment is clearly one of law, in connection with which a reviewing court has an obligation to reach its own conclusions independent of those reached by the inferior courts. *Skinner v. Ogallala Pub. Sch. Dist. No. 1*, 262 Neb. 387, 631 N.W.2d 510 (2001).

ANALYSIS

[3,4] Neb. Rev. Stat. § 48-101 (Reissue 1998) compensates injury caused an employee by an accident arising out of and in the course of his or her employment. *Logsdon v. ISCO Co.*, 260 Neb. 624, 618 N.W.2d 667 (2000). The two phrases “arising out of” and “in the course of” in § 48-101 are conjunctive; thus, both must be established by a preponderance of the evidence. *Skinner v. Ogallala Pub. Sch. Dist. No. 1*, *supra*.

ARISING OUT OF EMPLOYMENT

[5,6] The test to determine whether an act or conduct of an employee which is not a direct performance of the employee’s work “arises out of” his or her employment is whether the act is reasonably incident thereto, or is so substantial a deviation as to constitute a break in the employment which creates a formidable independent hazard. *Cords v. City of Lincoln*, 249 Neb. 748, 545 N.W.2d 112 (1996); *Cannia v. Douglas Cty.*, 240 Neb. 382, 481 N.W.2d 917 (1992). The “arising out of” employment requirement is primarily concerned with causation of an injury. *Cox v. Fagen Inc.*, 249 Neb. 677, 545 N.W.2d 80 (1996).

[7] All acts reasonably necessary or incident to the performance of the work, including such matters of personal convenience and comfort, not in conflict with specific instructions, as an employee may normally be expected to indulge in, under the conditions of his work, are regarded as being within the scope or sphere of the employment. *Cords v. City of Lincoln*, *supra*. “[N]o break in the employment is caused by the mere fact that the workman is ministering to his personal comforts or necessities, as by . . . leaving his work . . . to procure drink, refreshments, [or] food.” *Appleby v. Great Western Sugar Co., Inc.*, 176 Neb. 102, 107, 125 N.W.2d 103, 107 (1963).

Under the facts of this case, Misesk’s journey to the convenience store to obtain soft drinks for herself, her supervisor, and her coworker was a matter of personal convenience and comfort an employee may normally be expected to indulge in. We conclude that her injury arose out of her employment.

ARISING IN COURSE OF EMPLOYMENT

[8,9] The “in the course of” requirement of § 48-101 has been defined as testing the work connection as to time, place, and

activity; that is, it demands that the injury be shown to have arisen within the time and space boundaries of the employment, and in the course of an activity whose purpose is related to the employment. *Skinner v. Ogallala Pub. Sch. Dist. No. 1*, 262 Neb. 387, 631 N.W.2d 510 (2001). An injury is said to arise in the course of the employment when it takes place within the period of the employment, at a place where the employee reasonably may be, and while the employee is fulfilling work duties or engaged in doing something incidental thereto. *Skinner v. Ogallala Pub. Sch. Dist. No. 1*, *supra*.

The majority of the review panel relied upon *La Croix v. Omaha Public Schools*, 254 Neb. 1014, 582 N.W.2d 283 (1998), *Johnson v. Holdrege Med. Clinic*, 249 Neb. 77, 541 N.W.2d 399 (1996), and *Thomsen v. Sears Roebuck & Co.*, 192 Neb. 236, 219 N.W.2d 746 (1974), in reversing the trial judge's award. The review panel's reliance on these cases was misplaced because the going to or coming from work rule is inapplicable to the present case. Misek was already at work, and was in the process of taking a rest or coffee break when her injury occurred. This finding is in accord with *King Waterproofing Co. v. Slovsky*, 71 Md. App. 247, 524 A.2d 1245 (1987). In *King Waterproofing Co.*, the employee was struck by a car while crossing the street during his coffee break. The Maryland Court of Special Appeals held that the injury sustained arose out of and in the course of his employment.

[10] Professor Larson tells us:

Now that the coffee break or rest break has become a fixture of many kinds of employment, close questions continue to arise on the compensability of injuries occurring off the premises during rest periods or coffee breaks of various durations and subject to various conditions. It is clear that one cannot announce an all-purpose "coffee break rule," since there are too many variables that could affect the result. . . .

The operative principle which should be used to draw the line here is this: If the employer, in all the circumstances, including duration, shortness of the off-premises distance, and limitations on off-premises activity during the interval can be deemed to have retained authority over the employee,

the off-premises injury may be found to be within the course of employment.

1 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 13.05[4] at 13-61 to 13-62 (2002).

[11,12] The trial judge of the compensation court found that CNG Financial exercised sufficient control over Misek by acquiescing to her request to go to the convenience store and buy soft drinks for herself and others. Whether an injury arose out of and in the course of employment must be determined from the facts of each case. *Torres v. Aulick Leasing*, 261 Neb. 1016, 628 N.W.2d 212 (2001). Factual determinations made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Id.*

Misek also testified that she generally stayed in "the area" during her breaks and would prematurely end her break and return to work early if business picked up while she was away. Misek was paid for her time during a break. In addition, Misek had previously traveled off-premises to buy soft drinks for herself and her coworkers, sometimes at the request of her supervisor. These facts are not in dispute. Where there is no factual dispute, the question of whether the injury arose out of and in the course of employment is clearly one of law, in connection with which a reviewing court has an obligation to reach its own conclusions independent of those reached by the inferior courts. *Skinner v. Ogallala Pub. Sch. Dist. No. 1*, 262 Neb. 387, 631 N.W.2d 510 (2001). Under these facts, we determine that CNG Financial retained control over Misek during her break. Her injury thus arose in the course of her employment.

CONCLUSION

Misek's injury, sustained off her employer's premises during a break, arose out of her employment. It also arose in the course of her employment because her employer retained authority over her during her break. We reverse the decision of the compensation court review panel and remand the cause with directions to vacate its order reversing the award of the trial judge.

REVERSED AND REMANDED WITH DIRECTIONS.

STEPHAN, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V.
KIMBERLY SUE FAUST, APPELLANT.
660 N.W.2d 844

Filed May 9, 2003. No. S-01-615.

1. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility.
2. _____. Although Neb. Rev. Stat. § 27-404(1)(a) (Reissue 1995) allows the accused to offer evidence of a pertinent trait of his or her character and allows the prosecution to rebut that evidence, Neb. Rev. Stat. § 27-405 (Reissue 1995) limits the manner in which the evidence may be admitted.
3. _____. Neb. Rev. Stat. § 27-403 (Reissue 1995) may serve to limit the use of character evidence.
4. _____. Although the character of an accused often is relevant to the issue of his or her conduct on a particular occasion, character evidence is normally inadmissible for that purpose under Neb. Rev. Stat. § 27-404(1) (Reissue 1995).
5. **Criminal Law: Evidence: Proof.** In criminal cases, the State is prohibited from attempting to prove the guilt of the accused by initiating an attack on his or her character.
6. **Rules of Evidence: Other Acts.** Neb. Rev. Stat. § 27-404(2) (Reissue 1995) specifically prohibits the admission of other bad acts evidence for the purpose of demonstrating a person's propensity to act in a certain manner.
7. _____. Evidence of prior bad acts of an accused might be admissible if it has independent relevance under Neb. Rev. Stat. § 27-404(2) (Reissue 1995).
8. **Rules of Evidence: Other Acts: Proof.** Before the prosecution may offer other crimes evidence under Neb. Rev. Stat. § 27-404(2) (Reissue 1995), it must prove to the trial court, out of the presence of the jury and by clear and convincing evidence, that the accused committed the crime, wrong, or act.
9. **Rules of Evidence: Other Acts: Jury Instructions.** Before the prosecution may offer other crimes evidence under Neb. Rev. Stat. § 27-404(2) (Reissue 1995), it must clearly state the purpose for which the evidence is offered; the court must state the purpose for which it is received; and any limiting instruction must clearly, simply, and correctly instruct the jury about the specific purpose for which it may consider the evidence.
10. **Criminal Law: Evidence: Proof.** The accused in a criminal case may seek to establish his or her good character if proof is confined to particular character traits that are relevant to the conduct involved in the crime with which he or she has been charged.
11. **Rules of Evidence: Prosecuting Attorneys.** Under Neb. Rev. Stat. § 27-404(1)(a) (Reissue 1995), once the accused in a criminal case presents evidence of his or her good character, the prosecution may rebut that evidence.
12. _____. Although Neb. Rev. Stat. § 27-404(1)(a) (Reissue 1995) allows the accused to present character evidence and allows rebuttal by the prosecution, the manner in which either party may present the evidence is limited by Neb. Rev. Stat. § 27-405 (Reissue 1995).

13. **Rules of Evidence: Proof.** Under Neb. Rev. Stat. § 27-405 (Reissue 1995), proof by either party must be made by expressions of reputation or opinion, unless the character trait is an essential element of a charge, claim, or defense.
14. **Trial: Rules of Evidence: Witnesses.** When character is not an element of the crime or a defense, Neb. Rev. Stat. § 27-405 (Reissue 1995) dictates that the only inquiry that can be made into specific instances of conduct is through cross-examination of the defendant's character witnesses.
15. ____: ____: _____. During a cross-examination under Neb. Rev. Stat. § 27-405 (Reissue 1995), the prosecutor is limited to an inquiry whether the witness has heard of a given fact, misdeed, or criminal conviction.
16. **Trial: Rules of Evidence: Witnesses: Proof.** Under Neb. Rev. Stat. § 27-405 (Reissue 1995), cross-examination questions and responses are not allowed as proof that the act occurred and are instead meant to test the witness' knowledge; thus the prosecution must accept the answer given by the witness, and this rule also applies to the direct examination of rebuttal witnesses.
17. ____: ____: _____. Under Neb. Rev. Stat. § 27-405 (Reissue 1995), the prosecution's rebuttal witnesses may testify only to reputation or opinion and the witnesses may not be used to prove that specific instances of conduct occurred.
18. **Trial: Rules of Evidence: Other Acts.** Under Neb. Rev. Stat. § 27-405 (Reissue 1995), even when a defendant improperly offers specific instances of his or her good conduct, the prosecution may not counter by offering evidence of specific instances of bad conduct.
19. **Trial: Other Acts: Proof.** A defendant can "open the door" to proof of specific instances of conduct if he or she testifies and makes specific claims about specific instances of his or her past conduct, and in that circumstance, evidence of specific instances of conduct by rebuttal witnesses may be admissible to directly contradict the specific claims of the accused.
20. **Evidence: Waiver: Appeal and Error.** A party who fails to make a timely objection to evidence waives the right on appeal to assert prejudicial error concerning the evidence received without objection.
21. **Effectiveness of Counsel.** A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal.
22. **Effectiveness of Counsel: Records: Appeal and Error.** When a claim of ineffective assistance of counsel is made on direct appeal, the determining factor is whether the record is sufficient to adequately review the question.
23. **Trial: Evidence: Appeal and Error.** If a matter has not been raised or ruled on at the trial level and requires an evidentiary hearing, an appellate court will not address the matter on direct appeal.
24. **Trial: Effectiveness of Counsel: Proof: Appeal and Error.** To establish a right to relief because of a claim of ineffective counsel at trial or on direct appeal, the defendant has the burden first to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case.
25. ____: ____: _____. To prove prejudice, the defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different.

26. **Words and Phrases.** A reasonable probability is a probability sufficient to undermine confidence in the outcome.
27. **Convictions.** When a defendant challenges a conviction, the question is whether there is a reasonable probability that absent the errors, the fact finder would have had a reasonable doubt concerning guilt.
28. **Effectiveness of Counsel: Presumptions.** When considering whether a counsel's performance was deficient, there is a strong presumption that counsel acted reasonably.
29. **Trial: Effectiveness of Counsel: Evidence: Appeal and Error.** When deciding whether to reverse a judgment for ineffective assistance of counsel without an evidentiary hearing for failure to object to evidence, appellate courts consider the lack of a plausible strategy, the egregious nature of the error, the prejudice incurred, the effect of judicial errors, and the effect of other trial errors.
30. **Criminal Law: Trial: Evidence: Appeal and Error.** An error in admitting or excluding evidence in a criminal trial, whether of constitutional magnitude or otherwise, is prejudicial unless it can be said that the error was harmless beyond a reasonable doubt.
31. **Verdicts: Juries: Appeal and Error.** Harmless error review looks to the basis on which the jury actually rested its verdict; the inquiry is not whether in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.
32. **Criminal Law: Evidence: New Trial: Appeal and Error.** Upon finding error in a criminal trial, the reviewing court must determine whether the evidence presented by the State was sufficient to sustain the conviction before the cause is remanded for a new trial.
33. **Double Jeopardy: Evidence: New Trial: Appeal and Error.** The Double Jeopardy Clause does not forbid retrial so long as the sum of the evidence offered by the State and admitted by the trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict.
34. **Self-Defense: Jury Instructions.** A trial court must instruct the jury on the issue of self-defense when there is any evidence adduced which raises a legally cognizable claim of self-defense.
35. **Self-Defense.** To successfully assert the claim of self-defense, a defendant must have a reasonable and good faith belief in the necessity of using force and the force used in defense must be immediately necessary and justified under the circumstances.
36. _____. Justifications for the use of force in self-defense are statutorily defined.
37. **Self-Defense: Proof.** The defendant bears the initial burden to produce evidence which supports a claim of self-defense.
38. **Self-Defense: Evidence: Jury Instructions.** If the trial evidence does not support a claim of self-defense, the jury should not be instructed on it.
39. **Jury Instructions.** An instruction which does not correctly state the law or which is likely to confuse or mislead the jury should not be given.
40. **Trial: Photographs.** The admission of photographs into evidence rests largely within the discretion of the trial court, which must determine their relevancy and weigh their probative value against their possible prejudicial effect.

41. **Homicide: Photographs.** In a homicide prosecution, photographs of a victim may be received into evidence for purposes of identification, to show the condition of the body or the nature and extent of wounds and injuries to it, and to establish malice or intent.
42. **Trial: Photographs.** A photograph which is admitted at trial depicting a victim while he or she was alive is not offered for a proper purpose.
43. **Confessions: Due Process.** Admission of an involuntary confession is precluded by the Due Process Clause of U.S. Const. amend. XIV and the due process clause of Neb. Const. art. I, § 3.
44. **Confessions.** To be admissible, a statement or confession of an accused must have been freely and voluntarily made.
45. _____. A defendant who objects to the voluntariness of a statement is entitled to a hearing in which both the underlying factual issues and the voluntariness of the statement are actually and reliably determined.
46. **Motions to Suppress.** An accused may move for suppression of a statement that he or she claims is involuntary.
47. **Motions to Suppress: Waiver.** An objection to an allegedly involuntary statement is waived if it is not raised by motion before trial, with the exception that a court may entertain motions to suppress after the commencement of trial when the defendant is surprised by the statements introduced by the State.
48. **Motions to Suppress: Appeal and Error.** An appellate court reviews the determination whether to entertain a motion to suppress made after the commencement of trial for an abuse of discretion.
49. **Trial: Confessions.** A hearing pursuant to *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964), may be appropriate even when the allegedly involuntary statement is made during rebuttal.
50. _____. A hearing pursuant to *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964), is not required for a statement that is being introduced solely for impeachment purposes, but the defendant may be entitled to a determination of voluntariness by the trial court, although not necessarily in the context of a *Jackson v. Denno* hearing.
51. **Confessions: Evidence.** An accused's statement, whether an admission or a confession, made to private citizens, as well as to law enforcement personnel, must be voluntary as determined by a court for admissibility and as a fact ascertained by the jury.

Appeal from the District Court for Otoe County: RANDALL L. REHMEIER, Judge. Reversed and remanded for a new trial.

James R. Mowbray and Jeffery A. Pickens, of Nebraska Commission on Public Advocacy, and Timothy W. Nelsen, Otoe County Public Defender, for appellant.

Don Stenberg, Attorney General, and Martin W. Swanson for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, McCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

A jury convicted the appellant, Kimberly Sue Faust, of two counts of first degree murder and two counts of use of a firearm to commit a felony. The district court sentenced her to consecutive terms of life imprisonment on each count of murder and 20 to 40 years' imprisonment for each count of use of a firearm to commit a felony.

Faust argues that the district court erred by (1) allowing prosecution witnesses to testify about specific instances of conduct when she acted aggressively or violently to rebut her character witnesses' testimony that she is a peaceful person, (2) instructing the jury on self-defense when it was not her theory of the case, (3) admitting into evidence photographs of the victims depicting them before their deaths, and (4) failing to hold a hearing to determine whether a statement that a police officer overheard her make to her father was voluntary. She also argues that she was denied effective assistance of counsel to the extent her trial counsel failed to address the issues now complained of on appeal, that there was prosecutorial misconduct, and that cumulative errors denied her due process.

We determine that under Neb. Rev. Stat. §§ 27-404 and 27-405 (Reissue 1995), the State is prohibited from introducing evidence of specific instances of a defendant's prior bad acts to rebut testimony of the defendant's character witnesses. We also address additional areas of concern about the performance of the attorneys involved at trial. Because the jury was exposed to a significant amount of improper and prejudicial testimony, we conclude that the district court erred in allowing the testimony Faust objected to and that she was denied effective assistance of counsel in the instances when her counsel did not object. We further conclude that because of the overwhelming prejudice to Faust's right to a fair trial, the convictions must be reversed and the cause remanded for a new trial.

BACKGROUND

On April 25, 2000, Shannon Bluhm and Robert Parminter were killed on an Otoe County road. Faust was later charged in the deaths. Faust's theory of defense was that her husband, Bruce Faust, killed Shannon and Robert.

STATE'S EVIDENCE

On the evening of April 25, 2000, Desiree Parminster, Robert's wife, heard screaming and a horn honking outside of her home in Otoe County. She looked out the window and saw the taillights of a car. She told Robert about the incident, and he went to the front porch. At that time, Desiree saw a pickup truck drive by. Robert, thinking nothing had happened, went back to bed, but Desiree then saw a fire in the front driver's side of the car.

Desiree told Robert about the fire, and he went outside. She called the 911 emergency dispatch service and then also went outside. Robert yelled to her that he saw a four-wheel-drive vehicle. Desiree then saw a rectangular vehicle start up the road without its lights on and drive past the car that was on fire. She next saw Robert open the passenger door of the burning car and pull someone out. As Robert carried the person toward the house, Desiree saw the rectangular vehicle coming back with its headlights on. The vehicle stopped between Desiree and Robert, blocking her view. She then heard three or four "popping" sounds, and the vehicle drove off. She did not see any other people at the scene. She went inside and called the 911 number again.

When members of the Palmyra and Eagle rescue squads arrived on the scene around 10 p.m., they found the bodies of Robert and a female who was later identified as Shannon. Shannon's car, a white Geo Prism, was engulfed in flames. The record shows that Shannon had been dating Faust's husband, Bruce. Bruce and Faust were separated, but still married, on April 25, 2000.

The pathologist who performed the autopsies testified that Robert died of at least two gunshot wounds to the head. Shannon had stab wounds to both the left and right areas of the chest, a gunshot wound to the back of the head, and a gunshot wound to the back. The gunshot wound to the back was the fatal wound. A forensic pathologist testified that Shannon had "defensive wounds" that were caused by a weapon such as a knife or a blade.

The State's evidence shows that on April 25, 2000, Faust loaded her bicycle into the back of her vehicle, a Jeep Cherokee, and drove it to a county road near a paved highway. Faust then rode the bicycle into Eagle, Nebraska. According to Faust, her plan was to leave the bicycle in Eagle and obtain a ride back to

her Jeep from her cousin. Faust, however, encountered Shannon in Eagle and accepted Shannon's offer to drive her back to her Jeep. Faust and the State dispute what took place after Shannon and Faust drove back to the Jeep.

The State presented evidence showing that sometime before April 25, 2000, Faust's father, William Borden, gave Faust a loaded revolver because there was criminal activity in the area and he was concerned about her safety. Borden stated that on April 25, Faust called him and asked him to come to her house because she had a problem. When he arrived, Borden found Faust sitting at a picnic table, crying. She said that she had gone for a bicycle ride and that Shannon gave her a ride back to her Jeep. She said that after getting in the car, Shannon started cussing and calling her names. Faust told Borden that Shannon hit her and pulled her hair and that she hit Shannon back. Faust said that she and Shannon then scuffled outside the car, that Shannon had a knife, and that Shannon got "cut or stuck" by the knife. Faust told Borden that she next got into her Jeep and got the gun, that then someone grabbed her, and that the gun went off inside the Jeep. When she got home, she placed the gun in a freezer in her garage. Faust later gave Borden the gun, and he placed it in his truck. Borden also observed a bullet hole in the glove compartment of the Jeep. At about 3 a.m. on April 26, Joel Bergman, a criminal investigator with the Nebraska State Patrol, arrived at Faust's residence and stated that he was investigating a double homicide. Borden gave the gun to Bergman.

While he was at Faust's residence, Bergman overheard a conversation between Borden and Faust. Borden indicated that the situation was his fault because he had discouraged Faust from moving away. Faust replied, "It's not your fault, it's my doing."

Ashley Faust, Bruce and Faust's daughter, testified that Faust was wearing a gray sweatshirt when she left the house on April 25, 2000, and that when she returned at about 10 p.m., Ashley saw Faust go into the bathroom and change clothes. Ashley gave a gray sweatshirt to Bergman. The sweatshirt was later determined to have bloodstains on it, but investigators were unable to obtain a DNA sample from it. According to Ashley, Faust had been upset about a romantic relationship between Shannon and Bruce.

Bergman later arrested Faust and searched her residence. As a result of the search, Bergman found blood on Faust's Jeep and on a notebook on the front passenger seat. An arson investigator found scissors and a serrated knife blade in Shannon's car. A key that fit Faust's Jeep was found at the crime scene.

Blood samples from Faust's Jeep and the notebook were tested. The results showed that blood on the Jeep passenger door, driver's-side door, and driver's-side passenger door came from Robert. Blood from the notebook, the bottom of the driver's-side passenger door, and the driver's-side seat came from Shannon. Blood from the inside driver's-side ledge came from more than one person, with Shannon as a major contributor. Bullet fragments recovered from Robert's body and bullets recovered from Shannon's body were fired by the gun that Faust had in her possession on April 25, 2000.

Various witnesses testified that they saw a vehicle parked on the side of the road on April 25, 2000. One witness, who was driving a Chevrolet pickup, saw a Jeep Cherokee and a white car on the side of the road near the Parminters' home at about 9:35 p.m. The windows of the car were steamed up, and as he drove by, someone partially opened the door.

FAUST'S EVIDENCE

Faust testified that on April 25, 2000, she parked her car off the highway because she was afraid Bruce would see it and she did not want him to find her. She testified that when Shannon drove her to her Jeep, Bruce pulled up and got in Shannon's car with them. According to Faust, a struggle took place between Bruce and Shannon, and in the process, Faust got hit in the eye. She stated that at one point, Bruce opened the car door and she saw a truck drive by. She testified that she got out of the car and went to her Jeep and that she had blood on her leg. She stated that she had the gun in the glove compartment of the Jeep because she was intending to return it to Borden. She got the gun out, it went off, and then she saw Shannon's car on fire. She went back to where the car was on fire, and Bruce was there. According to Faust, Bruce grabbed her and the gun went off. She testified that Bruce then tried to shoot her, but the gun would not work. She stated that Bruce threatened her not to tell

anyone and that when she went home, she did not think anyone was dead. Faust said that she wore a red sweatshirt on the night of the murders. She also stated that she had her Jeep keys tied to her shoelaces and that Bruce had a key to her Jeep.

The defense presented evidence that a passenger in the Chevrolet pickup which had driven by the white car had previously stated that when he saw the passenger door of the car open, he saw what he assumed to be a man's arm. The defense also presented evidence that the relationship between Bruce and Shannon had "cooled off" by April 2, 2000, and that Bruce had a history of acting violently. Faust also called various character witnesses.

After Faust presented her defense, the State called several rebuttal witnesses. The testimony of Faust's character witnesses, the rebuttal witnesses, and other pertinent facts are described in the analysis section of this opinion.

INSTRUCTIONS AND CLOSING ARGUMENTS

Faust was not present at the instruction conference, but no objection was made about her absence. At the instruction conference, Faust's attorney noted that the court had decided to give a self-defense instruction for the charge involving Shannon. Faust's attorney then requested a self-defense instruction for the charge involving Robert. The court denied the instruction because there was no evidence of self-defense in Robert's death.

At closing arguments, the State, during its rebuttal argument, pointed out Faust's character trait for violence and brought out specific incidents of her violent and aggressive conduct that are detailed later in this opinion. The jury convicted Faust on all counts, and Faust was sentenced to consecutive terms of life imprisonment on each count of murder and 20 to 40 years' imprisonment for each count of use of a firearm to commit a felony. Faust appeals.

ASSIGNMENTS OF ERROR

Faust assigns, rephrased, that the district court erred by (1) admitting into evidence proof of specific instances of Faust's conduct and allowing the prosecutor to argue inferences drawn from that conduct, (2) allowing the prosecutor to cross-examine Faust's

daughter, Ashley, about specific instances of Faust's conduct, (3) allowing the prosecutor to inquire into Ashley's reasons for wanting to live with Bruce and impeaching her with a letter she wrote, (4) instructing the jury on self-defense, (5) admitting into evidence photographs of the victims that were taken when they were alive, (6) asking Desiree whether Robert had had the injuries depicted in a postdeath photograph when he left the house on April 25, 2000; (7) admitting into evidence Faust's statement "it's my doing," (8) admitting into evidence testimony concerning Borden's character for peacefulness and allowing the prosecutor to argue inferences based on that testimony, (9) conducting the jury instruction conference in Faust's absence, and (10) allowing cumulative errors that denied Faust due process.

Faust also assigns that to the extent her trial counsel waived any of her assignments of error, she was denied effective assistance of counsel. She also assigns that the record suggests further instances of ineffective assistance of counsel. Finally, she assigns that each issue constituted prosecutorial misconduct.

STANDARD OF REVIEW

[1] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. *State v. Harris*, 263 Neb. 331, 640 N.W.2d 24 (2002); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001). Other standards of review are included in our analysis of the issues.

ANALYSIS

EVIDENCE OF FAUST'S CHARACTER

Faust contends that the district court erred by allowing the prosecution to present evidence of specific instances of violent conduct to rebut her character witnesses' testimony that she is a peaceful person. She further argues that when her counsel did not object to the evidence, she was denied effective assistance of counsel. The State counters that it was entitled to prove specific instances of conduct that Faust had previously acted in a violent manner because she first presented evidence of her character for peacefulness.

FAUST'S CHARACTER WITNESSES

Donna McCaugherty, a lay minister who had been counseling Faust, testified as a character witness for Faust. She stated that in her opinion, Faust is a very truthful and calm person. On cross-examination, the State asked McCaugherty if she was aware that Faust had previously pointed a gun at Bruce, had rammed her vehicle into a vehicle operated by Bruce, and had thrown tools and a steel milk crate at him. She stated that she was not aware of these incidents.

Bryan Kennedy, a friend of Faust, testified that Faust is a calm and pleasant person. He testified about an incident in which Bruce fired a gun over Faust's shoulder and she reacted in a calm manner. On cross-examination, the State asked Kennedy if he was aware that Faust had pointed a gun at Bruce. He was not aware of the incident. The State then asked if he was aware that Faust had rammed Bruce's vehicle with her vehicle. He stated that he had heard several versions of that story.

Diana Seip, Faust's sister, testified that in March 2000, Bruce physically abused Faust. She then heard Borden state that he would "bury" Bruce if he touched Faust again. Seip stated that she thought Borden would physically harm Bruce if he touched Faust one more time. She also testified that Faust is one of the most calm people she has ever known and that Faust is very truthful. On cross-examination, Seip was asked if she thought Borden was a peaceful person and she answered yes.

Borden stated that Faust is a peaceful person who tells the truth. On cross-examination, the State asked Borden if he is generally a peaceful person but can get frustrated enough to act out in violence. Borden answered yes.

Although Ashley did not testify about Faust's character for peacefulness, she did testify about instances when Bruce behaved in a violent manner. Ashley stated that Bruce once ran into her with his vehicle, that he hit her with a frying pan, and that he pointed a gun at Faust. Ashley also stated that Bruce once told Faust to shoot herself in the head. Ashley testified that on April 25, 2000, Bruce called the house while Faust was gone and she told him that Faust had gone on a bicycle ride.

Without objection, the State asked Ashley on cross-examination about a time when she had wanted to live with

Bruce. The State asked if one of the reasons she wanted to live with Bruce was because Faust “yelled and screamed at [her] all the time.” Ashley replied that Faust did not yell but would get upset. The State also asked if another reason was because Faust lied about Bruce. Ashley answered “[n]o” and stated, “My mom does not lie to me.” Without objection, the State then asked Ashley to read a letter she had written, which stated in part, referring to Faust: “She’s always taking her anger out on me, always yelling and complaining, 24/7, all the time,” and “she lies to my [probation officer] and counselor to make my dad look like the bad guy.”

In her case in chief, Faust called Bruce as a witness and he admitted that he once became upset at Faust and acted aggressively. He admitted that he slammed a telephone down, causing it to come off of the wall, and that he slammed a door into a refrigerator, causing a dent. He denied ever pointing a gun at Ashley.

Faust testified about an incident when Bruce fired a gun over her shoulder. She also explained the incident in which she allegedly rammed her vehicle into Bruce’s vehicle. She stated that he was driving in front of her and slammed on his brakes to cause her to hit him. She also discussed other instances when Bruce acted violently. Faust admitted that there were instances in which she was physically aggressive toward Bruce and that she thought the aggression “went both ways.”

STATE’S REBUTTAL EVIDENCE

On rebuttal, the State called several witnesses who testified about specific instances of Faust’s violent conduct. Jeff Bluhm (Bluhm), Shannon’s husband, testified that Faust called him at times when she knew Bruce and Shannon were together. He stated that Faust wanted him to become involved in breaking up Bruce and Shannon’s relationship and that she once called him 10 times during the same night. He described the nature of the calls as a “very aggravated, furious type.” He stated that he got a caller identification device and started screening calls because Faust called him so often. Faust’s attorney stated “[o]bjection” at the beginning of Bluhm’s testimony about the calls, but the record shows no discussion with the court about the objection or a ruling by the court.

Bluhm next testified about an incident when he went to pick up his and Shannon's children at Shannon's workplace and Faust abruptly drove up, hitting the curb with her vehicle. He stated that Faust got out of her vehicle as if she was "on a mission," briskly walked up to Shannon, and said, "What the fuck are you doing with my husband, you bitch?" Bluhm testified that the situation was "aggravated" and that he stepped between Shannon and Faust and told Shannon to go inside.

Faust's attorney objected to the testimony based on § 27-404. The State argued that the testimony was being offered under § 27-404(1) to rebut evidence about Faust's character for peacefulness. The court indicated that it did not think § 27-404(2) applied, and the State abandoned an argument that the evidence had independent relevance under § 27-404(2). In particular, the following conversation occurred:

[Faust's attorney]: Your Honor, I believe [the State] is getting into some [§ 27-]404 materials that pursuant to that rule I think we're entitled to a hearing outside the presence of the jury.

THE COURT: Well, let me figure out where we are. What's the testimony going to be . . . ?

[The State]: That there was a confrontation where Kim Faust called Shannon Bluhm filthy names and started to physically approach her.

THE COURT: Now, just so that I'm clear, are you offering this then under [§ 27-]404(1)A in rebuttal to the evidence put on with regard to her character trait of peacefulness? Is that what you're doing?

[The State]: Yes, Your Honor, and also there was testimony by Kim Faust that there — that she had a couple of conversations and there never was any problems between her and Shannon. And I think it also goes to motive, because she's now testified that someone else did these crimes.

THE COURT: Well, if we get into motive, you're down into [§ 27-]404(2), I think. If you're offering it —

[The State]: Could I look at the specific rule?

THE COURT: If you're offering it to rebut the testimony with regard to her character trait of being peaceful, then I don't think [§ 27-]404(2) and (3) apply, and I can just

merely give the jury an instruction, an instruction that it's being offered to rebut.

[The State]: Could I look at that specific rule, Judge? Yes, Your Honor, I didn't remember the rule number, but I'm offering this to show that . . . you're allowed to go into specific acts showing the character that's been offered to rebut that character.

THE COURT: Okay. Well, for that limited purpose, I'll permit the questioning.

Neither attorney nor the court discussed § 27-405. The court allowed the testimony and gave the jury a limiting instruction, which stated in part: "This testimony was received only to help you to decide whether you believe the testimony of [Faust]'s witnesses who testified with regard to [Faust]'s character for peacefulness, those witnesses being Donna McCaugherty, Bryan Kennedy, Diana Seip, and William Borden."

The State also called Bruce's friend, Gordon Lukes. Without objection, Lukes stated that in February 2000, he went to the Faust residence to help Bruce get some of his personal belongings. When Lukes pulled into the driveway, he saw Faust "kind of in a total rage, kicking and screaming and hollering and yelling." Lukes stated that Faust then yelled at him and told him to "get the fuck out of there because [he] was trespassing." He testified that Faust was kicking Bruce and using numerous profanities. Lukes stated that Faust also threw things at Bruce, including a steel milk crate, which hit Bruce in the back between the shoulder blades and then bounced up and over a truck. He described Faust's demeanor as an "uncontrolled rage." Lukes testified that Bruce was very calm during the incident. After the testimony, the court gave the jury a limiting instruction that was substantially the same as the instruction given after Bluhm's testimony.

On rebuttal, Bruce testified that Faust had purposely hit his vehicle with her vehicle. Without objection, Bruce also testified that in February 2000, Faust pointed a gun at him twice and that someone had to grab the gun away from her.

PRINCIPLES OF LAW

The ability of the State and the accused to present evidence of a character trait and the manner in which that evidence may be

presented is addressed by Neb. Rev. Stat. § 27-403 (Reissue 1995) and §§ 27-404 and 27-405.

Section 27-404 explains when character evidence is admissible and provides in part:

(1) Evidence of a person's character or a trait of his or her character is not admissible for the purpose of proving that he or she acted in conformity therewith on a particular occasion, except:

(a) Evidence of a pertinent trait of his or her character offered by an accused, or by the prosecution to rebut the same;

....

(2) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

(3) When such evidence is admissible pursuant to this section, in criminal cases evidence of other crimes, wrongs, or acts of the accused may be offered in evidence by the prosecution if the prosecution proves to the court by clear and convincing evidence that the accused committed the crime, wrong, or act. Such proof shall first be made outside the presence of any jury.

[2] Although § 27-404(1)(a) allows the accused to offer evidence of a pertinent trait of his or her character and allows the prosecution to rebut that evidence, § 27-405 limits the manner in which the evidence may be admitted. Section 27-405 provides:

(1) In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(2) In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct.

[3] Section 27-403 may also serve to limit the use of character evidence. Under § 27-403: "Although relevant, evidence may be

excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

[4-6] It is uniformly recognized that although the character of an accused often is relevant to the issue of his or her conduct on a particular occasion, character evidence is normally inadmissible for that purpose under § 27-404(1). See, *State v. Trotter*, 262 Neb. 443, 632 N.W.2d 325 (2001); *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999). See, e.g., *Freeman v. State*, 486 P.2d 967 (Alaska 1971); *Henson v. State*, 239 Ark. 727, 393 S.W.2d 856 (1965); *People v. Baskett*, 237 Cal. App. 2d 712, 47 Cal. Rptr. 274 (1965), *disapproved on other grounds*, *People v. Kelley*, 66 Cal. 2d 232, 424 P.2d 947, 57 Cal. Rptr. 363 (1967). See, generally, *Michelson v. United States*, 335 U.S. 469, 69 S. Ct. 213, 93 L. Ed. 168 (1948). In criminal cases, the State is prohibited from attempting to prove the guilt of the accused by initiating an attack on his or her character. See, e.g., *Freeman*, *supra*. Section 27-404(2) specifically prohibits the admission of other bad acts evidence for the purpose of demonstrating a person’s propensity to act in a certain manner. *Sanchez*, *supra*.

[7-9] Evidence of prior bad acts of an accused might still be admissible if it has independent relevance under § 27-404(2). But before the prosecution may offer other crimes evidence under § 27-404(2), it must prove to the trial court, out of the presence of the jury and “by clear and convincing evidence that the accused committed the crime, wrong, or act.” § 27-404(3); *Sanchez*, *supra*. We further require that the prosecution clearly state the purpose for which the evidence is offered and that the court must state the purpose for which it is received. *Sanchez*, *supra*. Any limiting instruction must “‘clearly, simply, and correctly” instruct the jury as to the *specific* purpose for which [it] may consider the evidence.’” (Emphasis in original.) *Id.* at 308, 597 N.W.2d at 374. Here, the State did not attempt to prove to the court, outside the presence of the jury, that Faust’s acts actually occurred. Instead, the State specifically abandoned any argument that the evidence had independent relevance and has not argued that § 27-404(2) applies to this case. The court did not hold a hearing or consider whether the evidence was admissible under

§ 27-404(2), and the jury was not instructed on § 27-404(2). Accordingly, we do not address whether any of the evidence might have been admissible under § 27-404(2). See, generally, *Sanchez, supra*.

[10,11] The rule prohibiting the use of character evidence to prove conduct is not applied to the accused in criminal cases. It is consistently held that the accused may seek to establish his or her good character if proof is confined to particular character traits that are relevant to the conduct involved in the crime with which he or she has been charged. § 27-404(1)(a). See, e.g., *Freeman, supra*. It is equally established that once the accused presents evidence of his or her good character, the prosecution may rebut that evidence. *Id.*

[12,13] Although § 27-404(1)(a) allows the accused to present character evidence and allows rebuttal by the prosecution, the manner in which either party may present the evidence is limited by § 27-405. Under § 27-405, proof by either party must be made by expressions of reputation or opinion, unless the character trait is an essential element of a charge, claim, or defense. § 27-405. See, e.g., *United States v. Herman*, 589 F.2d 1191 (3d Cir. 1978), *cert. denied* 441 U.S. 913, 99 S. Ct. 2014, 60 L. Ed. 2d 386 (1979). Here, a character trait for violence is not an element of the crime charged, nor did Faust assert a defense that required a character for peacefulness as an element.

[14,15] When character is not an element of the crime or a defense, § 27-405 dictates that the only inquiry that can be made into specific instances of conduct is through cross-examination of the defendant's character witnesses. § 27-405; *State v. Bourgeois*, 639 A.2d 634 (Me. 1994); 2 Joseph M. McLaughlin, Weinstein's Federal Evidence § 405.03[2][a] (2d ed. 2003). See *State v. Eynon*, 197 Neb. 734, 250 N.W.2d 658 (1977). During cross-examination, the prosecutor is limited to an inquiry whether the witness has heard of a given fact, misdeed, or criminal conviction. See, e.g., *Michelson v. United States*, 335 U.S. 469, 69 S. Ct. 213, 93 L. Ed. 168 (1948); *United States v. Curry*, 512 F.2d 1299 (4th Cir. 1975), *cert. denied* 423 U.S. 832, 96 S. Ct. 55, 46 L. Ed. 2d 50; *United States v. Beno*, 324 F.2d 582 (2d Cir. 1963); *Bourgeois, supra*; *State v. Kelly*, 102 Wash. 2d 188, 685 P.2d 564 (1984) (en banc). The inquiry is not intended to act

as proof that the conduct occurred. Rather, it is intended to test the basis of the witness' opinion or his or her knowledge of the defendant's reputation. See, *State v. Williams*, 111 Ariz. 511, 533 P.2d 1146 (1975); *Bourgeois*, 639 A.2d at 637 n.7, quoting Richard H. Field & Peter L. Murray, *Maine Evidence* § 405.2 (3d ed. 1992) ("objective of cross-examination of a character witness for an accused is to show an inadequate basis for the reputation to which the witness has testified on direct"). See, also, *Kelly*, 102 Wash. 2d at 194, 685 P.2d at 569 ("primary purpose of [character witnesses'] cross examination must be to impeach the testimony of the character witnesses, not to discredit the person on trial").

[16] Because cross-examination questions and responses are not allowed as proof that the act occurred and are instead meant to test the witness' knowledge, the prosecution must accept the answer given by the witness. Thus, if the witness states that he or she is not aware of the act asked about, the prosecution may not prove that the act occurred through other witnesses or with extraneous evidence. See, e.g., *Bourgeois, supra*; *State v. O'Neal*, 432 A.2d 1278 (Me. 1981). This rule also applies to the direct examination of rebuttal witnesses. See, e.g., *Curry, supra*; *Beno, supra*; *Freeman v. State*, 486 P.2d 967 (Alaska 1971); *Henson v. State*, 239 Ark. 727, 393 S.W.2d 856 (1965); *People v. Baskett*, 237 Cal. App. 2d 712, 47 Cal. Rptr. 274 (1965), *disapproved on other grounds*, *People v. Kelley*, 66 Cal. 2d 232, 424 P.2d 947, 57 Cal. Rptr. 363 (1967); *Bourgeois, supra* (citing 2 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence* ¶ 405[02] (1993)); *People v. Champion*, 411 Mich. 468, 307 N.W.2d 681 (1981). See, also, *Kelly, supra* (in dicta). See, generally, *Williams, supra*; *O'Neal, supra*. The rule's intent is to counter the concern that extraneous evidence of specific instances of conduct has the potential to be confusing to the jury and overly prejudicial to the defendant.

In *Bourgeois, supra*, a rebuttal witness testified about the defendant's specific past acts of violence to rebut the testimony of character witnesses about his reputation for peacefulness. Because of the improper use of evidence of specific instances of conduct, the Supreme Court of Maine reversed the conviction. The court explained:

Unless character is an essential element of the offense charged, the only inquiry that can be made into specific instances of conduct is, as [Maine Rules of Evidence] 405(a) provides, through cross-examination of the character witness.

“The reason for the rule of exclusion lies in the tendency of triers of fact to give excessive weight against the accused respecting any specific illegal activity. It further tends to confuse the jury concerning the main issue of guilt or innocence of the offense charged and calls upon the accused to account for past wrongdoings for which he is not being tried. The main thrust of such evidence, such as other unrelated wrongful acts of the accused, is to pollute the minds of the jury against the defendant. . . . ‘If such testimony should be admitted, the defendant might be overwhelmed by prejudice, instead of being tried upon the evidence affirmatively showing his guilt of the specific offense with which he is charged.’” *City of Topeka v. Harvey*, [188 Kan. 841, 365 P.2d 1109 (1961)].

State v. Bourgeois, 639 A.2d 634, 637 (Me. 1994). See, also, *Freeman*, *supra* (discussing reasons for rule); *Henson*, *supra* (admission of specific instances of conduct to prove character raises collateral issues and diverts minds of jurors from matter at hand).

[17] Under § 27-405, the prosecution’s rebuttal witnesses may testify only to reputation or opinion. The witnesses may not be used to prove that specific instances of conduct occurred. See, *United States v. Curry*, 512 F.2d 1299 (4th Cir. 1975), *cert. denied* 423 U.S. 832, 96 S. Ct. 55, 46 L. Ed. 2d 50; *United States v. Beno*, 324 F.2d 582 (2d Cir. 1963); *Freeman*, *supra*; *Henson*, *supra*; *Baskett*, *supra*; *Bourgeois*, *supra*; *Champion*, *supra*. See, also, *Kelly*, *supra* (in dicta). See, generally, *State v. Williams*, 111 Ariz. 511, 533 P.2d 1146 (1975); *O’Neal*, *supra*.

[18] Section 27-405 limits the defendant’s evidence of character to evidence of opinion or reputation. But even when a defendant improperly offers specific instances of his or her good conduct, the prosecution may not counter by offering evidence of specific instances of bad conduct. *United States v. Herman*,

589 F.2d 1191 (3d Cir. 1978), *cert. denied* 441 U.S. 913, 99 S. Ct. 2014, 60 L. Ed. 2d 386 (1979); *Beno*, *supra*; *Henson v. State*, 239 Ark. 727, 393 S.W.2d 856 (1965). See *People v. Baskett*, 237 Cal. App. 2d 712, 719, 47 Cal. Rptr. 274, 279 (1965) (character witness' testimony, "whether properly received or not," did not open door to rebuttal witness' testimony about specific instances of conduct). As one court stated:

[I]t makes little sense to insist that once incompetent evidence is erroneously admitted, the error must of necessity be compounded by "opening the door" so wide that rebutting collateral, inflammatory and highly prejudicial evidence may enter the minds of the jurors. In short, a small advantage improperly obtained does not compel the exacting of a gross disadvantage in penalty, particularly where a tarnished verdict is the inevitable result.

Beno, 324 F.2d at 588-89. See, also, *Henson*, 239 Ark. at 732, 393 S.W.2d at 859 ("two wrongs do not make a right"). See, generally, *Freeman v. State*, 486 P.2d 967, 976 (Alaska 1971) ("door to rebuttal once opened must not be broadened into a gateway to jury prejudice").

[19] A defendant can "open the door" to proof of specific instances of conduct if he or she testifies and makes specific claims about specific instances of his or her past conduct. In that circumstance, evidence of specific instances of conduct by rebuttal witnesses may be admissible to directly contradict the specific claims of the accused. *Freeman*, *supra*; *Henson*, *supra*.

APPLICATION TO FAUST'S CASE

We now address testimony of specific instances of conduct presented in Faust's case that are raised on appeal. We note at the outset that Faust presented four character witnesses who testified that in their opinion, she was a peaceful person. At least one was allowed to testify about a specific instance of Faust's peaceful behavior.

JEFF BLUHM

The State called Bluhm as a rebuttal witness. Bluhm testified about an incident when Faust drove up, hitting the curb with her vehicle; approached Shannon in a threatening manner as if she was "on a mission"; and called her a "bitch." Faust's attorney

objected to the testimony. The prosecution stated that the evidence was being used solely to rebut Faust's character for peacefulness. The court allowed the testimony for that purpose only and gave a limiting instruction.

The court erred in allowing the testimony. The law is clear that the prosecution cannot prove specific instances of conduct through extrinsic evidence. Instead, the prosecution was limited to cross-examination of Faust's character witnesses about whether they had knowledge of instances in which Faust behaved in a non-peaceful manner.

The State contends that by presenting evidence of her own good character and by testifying about a specific instance of good character, Faust opened the door to proof of specific instances of conduct on rebuttal. We disagree. Under § 27-405, the State must limit its rebuttal of statements made by character witnesses to cross-examination and must accept the answers provided by the witnesses. Courts have repeatedly stated concerns about the inflammatory and prejudicial nature of testimony about specific acts of bad conduct, and § 27-405 is formulated to address those concerns.

The State also argued to the trial court that Faust stated there was never any problem between her and Shannon and that the testimony was admissible to rebut that statement. But the record does not support the State's argument, and the court did not allow the evidence for that purpose. Further, an inquiry into specific instances of conduct on rebuttal is allowed only to rebut a defendant's denial of a specific occurrence.

Here, the State chose to prove on rebuttal that the incident actually occurred, which is not allowed. Further compounding the error is that none of Faust's character witnesses were asked on cross-examination about the specific instance when Faust got out of her car and approached Shannon in a threatening manner. Yet Bluhm was asked about that incident on rebuttal. The evidence would not be admissible even if Faust's witnesses had denied knowledge of the acts on cross-examination, but that they were never asked makes the State's argument that the evidence was necessary for rebuttal irrelevant.

Bluhm's testimony served to show only that Faust has a bad character trait for violence and acted in conformity with that

character on April 25, 2000, which is inadmissible under § 27-404(1). Evidence of a criminal defendant's prior instances of conduct may not be admitted solely to show propensity. Here, the State presented the evidence solely to rebut Faust's character witnesses, which is not permitted under § 27-405(1). The jury was then instructed that it could consider the evidence for a purpose that is not allowed by § 27-405. Indeed, the instruction, when it informed the jury that the evidence could be used to determine if they believed Faust's character witnesses, allowed the jury to consider improper evidence of propensity to reach that determination. If the jury believed Faust had a propensity for violent behavior, they would likely not believe her character witnesses. This is specifically what §§ 27-404(1) and 27-405 prohibit. See *Sanchez, supra*. Accordingly, the trial court erred when it allowed Bluhm to testify about specific instances of Faust's conduct.

UNOBJECTED-TO REBUTTAL TESTIMONY

Faust also complains about testimony that was not objected to at trial. We first address instances of unobjected-to rebuttal testimony and then address unobjected-to questions asked during cross-examination. Finally, we address whether Faust's counsel was deficient for failing to object.

During the State's rebuttal, the following testimony was unobjected to or not objected to with sufficient specificity: (1) Bluhm testified about harassing telephone calls he received from Faust that he described as a "very aggravated, furious type"; (2) Lukes testified about an incident when Faust yelled at him and told him to "get the fuck out" because he was trespassing; (3) Lukes also testified that Faust screamed and yelled at Bruce, kicked him, threw a steel milk crate at him, hitting him in the back between the shoulder blades, and was in "an uncontrolled rage"; (4) Bruce testified that Faust pointed a gun at him twice and that someone had to grab the gun away from her; and (5) Bruce testified that Faust had purposely hit his vehicle with her vehicle.

[20] Faust's attorney did not object to the testimony. A party who fails to make a timely objection to evidence waives the right on appeal to assert prejudicial error concerning the evidence received without objection. *State v. Harms*, 263 Neb. 814, 643

N.W.2d 359 (2002), *modified on other grounds* 264 Neb. 654, 650 N.W.2d 481; *State v. Harris*, 263 Neb. 331, 640 N.W.2d 24 (2002). Faust may, however, raise a claim of ineffective assistance of counsel because of the failure of her counsel to object. See, generally, *State v. Hansen*, 252 Neb. 489, 562 N.W.2d 840 (1997). We first address whether the testimony was inadmissible. If the testimony is inadmissible, we then address whether Faust was denied effective assistance of counsel.

Bruce's testimony on rebuttal that Faust purposely hit his vehicle with her vehicle was admissible. Faust previously testified and specifically denied that she purposely hit Bruce's vehicle. Thus, Bruce could testify about the incident to rebut Faust's specific testimony about what happened in that specific instance. The rest of the testimony, however, was inadmissible and should have been objected to.

There were no objections to the testimony about the telephone calls, and this testimony was also inadmissible. The State could not inquire about specific instances of conduct on rebuttal. Further compounding the problem, Faust's character witnesses were not asked if they had knowledge of the telephone calls.

There should also have been objections to Lukes' testimony. Although some character witnesses were asked if they were aware that Faust had thrown tools and a steel milk crate at Bruce, the State was required to accept the witnesses' answers and could not seek on rebuttal to prove that the conduct occurred. Further, Faust admitted during her direct examination that she sometimes behaved aggressively toward Bruce. Thus, even if the State were allowed to rebut through instances of specific conduct—which it was not—it had nothing to rebut. Faust had already admitted to behaving aggressively toward Bruce. The State could not seek to expand on that admission by introducing numerous instances of Faust's violent conduct, which the rules prohibit to avoid jury prejudice and confusion. We note that Lukes testified that Bruce behaved in a calm manner during the incident, but the evidence was not admitted for that purpose, and we do not address whether it would be admissible for that purpose.

Finally, Bruce's testimony that Faust had pointed a gun at him was also inadmissible. As with other instances of rebuttal

testimony, the error was compounded because Faust had admitted that she had behaved aggressively toward Bruce.

The State is prohibited from using specific instances of conduct to prove character when the issue of character is circumstantial to the case. The rebuttal testimony was inadmissible.

UNOBJECTED-TO CROSS-EXAMINATION

Ashley did not provide character evidence for Faust during her direct examination. The State, however, cross-examined Ashley about specific instances of conduct, asking her if Faust “yelled and screamed at [her] all the time” and if Faust lied. When Ashley answered no, the State impeached her with a letter she wrote stating that Faust “yell[ed] and complain[ed] . . . all the time.” There was no objection.

The State’s cross-examination of Ashley was improper. Had Ashley provided character evidence, the State could have asked her if she was aware of certain instances of conduct to test her knowledge as a witness. The State would then be required to accept her answer. Here, Ashley did not provide any character testimony. Not only was the State barred from using extrinsic evidence to prove that specific instances of conduct occurred, it was barred from engaging in cross-examination about the conduct. The State’s cross-examination questions about Faust’s character were inadmissible. The impeachment based on Ashley’s answers to the questions further compounded the error. Because the State’s initial questions were improper, the impeachment should never have occurred. But even if the State had been able to ask cross-examination questions about Faust’s character, it would be required to accept the answer given by the witness.

HARMLESS ERROR AND INEFFECTIVE ASSISTANCE OF COUNSEL

We next address whether the unobjected-to errors deprived Faust of effective assistance of counsel and whether admission into evidence of the objected-to testimony was harmless error.

[21-23] Faust brings her claim of ineffective assistance of counsel on direct appeal. But such a claim need not be dismissed merely because it is made on direct appeal. *State v. Cody*, 248 Neb. 683, 539 N.W.2d 18 (1995). See *State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002), *cert. denied* 537 U.S. 918, 123

S. Ct. 303, 154 L. Ed. 2d 203. The determining factor is whether the record is sufficient to adequately review the question. *Cody, supra*. If the matter has not been raised or ruled on at the trial level and requires an evidentiary hearing, an appellate court will not address the matter on direct appeal. *Id.*

[24] To establish a right to relief because of a claim of ineffective counsel at trial or on direct appeal, the defendant has the burden first to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. See, *Thomas, supra*; *State v. Becerra*, 261 Neb. 596, 624 N.W.2d 21 (2001).

[25-27] To prove prejudice, the defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Boppre*, 252 Neb. 935, 567 N.W.2d 149 (1997), *disapproved on other grounds, State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998). When a defendant challenges a conviction, the question is whether there is a reasonable probability that absent the errors, the fact finder would have had a reasonable doubt concerning guilt. *Id.*

The U.S. Supreme Court has explained:

In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.

Strickland, 466 U.S. at 695-96. Accord *Boppre, supra*. In particular, the Court has stated that although these principles should

guide the decision, “*the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.*” (Emphasis supplied.) *Strickland*, 466 U.S. at 696. As the Court has noted, “[i]n every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.” *Id.*

We conclude that by failing to object to a significant amount of improper negative character evidence, Faust’s counsel’s performance was deficient and prejudiced her defense. This is true even though she also improperly offered a specific instance of conduct to show her character for peacefulness. One court has described the prejudice that arises as follows:

[A] criminal defendant is entitled to have his guilt or innocence determined on the specific offense charged and not risk the possibility of conviction for a series of prior specific acts which collectively suggested that his career had been reprehensible. The force of this principle, which lies at the heart of our criminal law system and seems a vital part of our definition of due process of law, is in no way blunted merely because a defendant has, in seeking acquittal, introduced evidence of less than questionable relevance. While there are instances in which a defendant may waive rights which the law invokes for his protection . . . the right to be tried for a specific offense, as the very foundation of a criminal trial as we know it, cannot be one of them.

United States v. Beno, 324 F.2d 582, 589 (2d Cir. 1963).

Because Faust’s counsel failed to object to the testimony, the State was able to parade before the jury a series of witnesses whose testimony was not only inadmissible but also prejudicial. Although presented as “rebuttal testimony,” the effect of the testimony was to demonstrate to the jury, over and over again, that Faust was a violent and aggressive person, and as such, that she had a propensity to commit the crime and should be convicted. Our jurisprudence does not allow this. See *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999).

When a jury is presented with inadmissible evidence that is inflammatory and has a high potential for jury confusion, we

cannot determine whether the defendant was convicted for committing the elements of the crime charged or whether the jury determined guilt because the defendant was a generally aggressive or violent person and, thus, more likely to commit the crime. See *State v. Lenz*, 227 Neb. 692, 419 N.W.2d 670 (1988) (improper testimony about defendant's character was not harmless error). When improper evidence of a defendant's prior bad acts is involved, the probability that the improper evidence unduly influenced the jury and denied the defendant a fair trial is so great that courts, using terms such as "serious prejudice" and "manifest injustice," overwhelmingly hold that the error is not harmless. See, *United States v. Pantone*, 609 F.2d 675 (3d Cir. 1979); *United States v. Herman*, 589 F.2d 1191 (3d Cir. 1978), *cert. denied* 441 U.S. 913, 99 S. Ct. 2014, 60 L. Ed. 2d 386 (1979); *United States v. Curry*, 512 F.2d 1299 (4th Cir. 1975), *cert. denied* 423 U.S. 832, 96 S. Ct. 55, 46 L. Ed. 2d 50; *Beno*, *supra*; *Sun B. Lee v. United States*, 245 F.2d 322 (9th Cir. 1957); *State v. Williams*, 111 Ariz. 511, 533 P.2d 1146 (1975); *Henson v. State*, 239 Ark. 727, 393 S.W.2d 856 (1965); *People v. Dee*, 14 Ill. App. 2d 96, 142 N.E.2d 811 (1957); *State v. O'Neal*, 432 A.2d 1278 (Me. 1981); *State v. Putzell*, 40 Wash. 2d 174, 242 P.2d 180 (1952).

Here, the jury should not have heard on rebuttal that Faust made numerous harassing telephone calls to Bluhm, that she had previously approached Shannon in a threatening manner and called her names, that she yelled at Lukes and used profanity, that she threw items at Bruce and called him names, and that she previously pointed a gun at Bruce. The jury heard Faust's telephone calls described as a "very aggravated, furious type." They also heard Faust described as being in an "uncontrolled rage" during one of the incidents. They then heard that she behaved as if she was "on a mission" during another. As we and other courts have recognized, even a small amount of such evidence is highly inflammatory and can serve only to confuse the jury about the issues in the case and affect their deliberations. See, e.g., *Curry*, 512 F.2d at 1304 (evidence that defendant "[a]bout a year ago . . . was dealing in drugs" was not harmless error); *Lenz*, *supra* (evidence of two instances of improper conduct was not harmless error). Further, the jury heard Ashley read a letter in which

she wrote that Faust yelled, complained, and screamed “24/7, all the time,” and that Faust lied about Bruce to make him look bad. Thus, the jury was improperly allowed to hear evidence that Faust lied about Bruce. This evidence could influence the jury to believe that if Faust lied about Bruce once, she would have the propensity to lie about him again at trial when she placed the blame on him for the murders.

Here, there were numerous instances of conduct that likely polluted the jury. During the State’s rebuttal argument, the prosecutor spoke about Faust’s character for peacefulness and argued that she was not peaceful based on the incidents where Faust threw a steel milk crate, called Shannon a “bitch,” made telephone calls to Bluhm, and pointed a gun at Bruce. There were no objections, and because the arguments were made on rebuttal, Faust’s counsel could not respond to them. The total effect of the errors was that the State was able to spend the last portion of the trial presenting evidence of numerous specific instances of Faust’s violent behavior and then use that to argue Faust’s guilt to the jury. Thus, the testimony was at the end of the trial where it was fresh in the juror’s memories and wafted an unwarranted innuendo into the jury box just before the jury entered deliberations. See *Michelson v. United States*, 335 U.S. 469, 69 S. Ct. 213, 93 L. Ed. 168 (1948). Here, where the jury was wrongly allowed to hear so many specific instances of conduct, Faust was deprived of a fair trial in a most fundamental manner.

The State, however, contends that we are unable to review the issue of ineffective assistance of counsel on direct appeal because the record is incomplete for a review of the question. We disagree. It is clear from the record that the trial court and attorneys involved in this case failed to read and understand § 27-405. As a result, Faust’s counsel initially objected to improper character evidence and then failed to continue to object as more prejudicial evidence was piled on. Here, Faust’s attorney, along with the prosecutor and the court, made a fundamental mistake of law. The situation was not one where a reasonable trial tactic or strategy was employed, and indeed, no strategy could be reasonable when the result would be a fundamentally unfair trial.

[28] It is correct that we have stated that when considering whether a counsel’s performance was deficient, there is a strong

presumption that counsel acted reasonably. See, e.g., *State v. Zarate*, 264 Neb. 690, 651 N.W.2d 215 (2002). But this presumption can be rebutted, and relief may be warranted without an evidentiary hearing when a decision by counsel cannot be justified as a result of a plausible trial strategy. *Jackson v. Leonardo*, 162 F.3d 81 (2d Cir. 1998).

Although we have not reversed a conviction on direct appeal for ineffective assistance of counsel for failure to object to prejudicial evidence, other jurisdictions have recognized that in some rare circumstances, a reasonable trial tactic or strategy cannot exist. In these cases, courts have reversed for ineffective assistance of counsel on direct appeal. See, e.g., *Com. v. Scullin*, 44 Mass. App. 9, 687 N.E.2d 1258 (1997); *Com. v. Gillette*, 33 Mass. App. 427, 600 N.E.2d 1009 (1992); *State v. Cutcher*, 17 Ohio App. 2d 107, 244 N.E.2d 767 (1969); *Stone v. State*, 17 S.W.3d 348 (Tex. App. 2000). See, also, *State v. Roybal*, 132 N.M. 657, 54 P.3d 61 (2002) (finding no reasonable trial strategy for failure to object, but determining that defendant was not prejudiced). See, generally, *People v. Guizar*, 180 Cal. App. 3d 487, 225 Cal. Rptr. 451 (1986) (applying plain error); *Broussard v. State*, 68 S.W.3d 197 (Tex. App. 2002) (Cohen, J., dissenting). In the federal courts, some circuits, including the Eighth Circuit, will reverse for ineffective assistance of counsel in the absence of an evidentiary hearing when there is no plausible explanation for counsel's actions. *Burns v. Gammon*, 260 F.3d 892 (8th Cir. 2001). See, also, *Leonardo*, *supra*. In particular, the U.S. Supreme Court recently noted that "[t]here may be cases in which trial counsel's ineffectiveness is so apparent from the record that appellate counsel will consider it advisable to raise the issue on direct appeal. There may be instances, too, when obvious deficiencies in representation will be addressed by an appellate court *sua sponte*." *Massaro v. United States*, No. 01-1559, 2003 WL 1916677 at *6 (U.S. Apr. 23, 2003).

[29] When reversing a judgment for ineffective assistance of counsel without an evidentiary hearing for failure to object to evidence, appellate courts have considered the lack of a plausible strategy, the egregious nature of the error, the prejudice incurred, the effect of judicial errors, and the effect of other trial errors. See, e.g., *Scullin*, *supra*; *Gillette*, *supra*; *Cutcher*, *supra*. For example,

in *Gillette*, the defendant was charged with indecent assault and battery of his daughter. At trial, evidence was admitted without objection that years earlier, while his wife was pregnant with another child, the defendant told his wife that if she had a daughter, he would take away the child's virginity. The jury heard the statement from three separate witnesses, and it was emphasized in both the prosecutor's opening and closing arguments. On appeal, the court noted that "[t]rial tactics which, from the vantage point of hindsight, can be seen to have failed do not amount to ineffective assistance unless 'manifestly unreasonable' when undertaken.'" *Gillette*, 33 Mass. App. at 429, 600 N.E.2d at 1011. But the court also considered the egregious nature of the error and the prejudice that resulted. The court determined that the evidence was "highly prejudicial" and "unquestionably, any 'ordinary fallible lawyer' would have sought to keep it out of the case." *Id.* at 430, 600 N.E.2d at 1011. The court then concluded as a matter of law that the evidence was more prejudicial than probative. The court stated that no reasonable trial strategy to justify the failure to object had been offered and that it could not imagine any. As a result, the court reversed the conviction.

In *Cutcher*, *supra*, defense counsel in a sexual assault case initially elicited testimony from his client about previous arrests for incest, assault, and battery. The state stipulated that an exhibit related to the testimony could be entered into evidence. On appeal, the court expressed disappointment with both the defense and prosecuting attorneys, indicating that the state should not have facilitated the reception into evidence of such damaging and prejudicial evidence. The court then noted, however, that the harm to the defendant's right to a fair trial arose from the actions of his attorney, who chose to introduce the evidence "for whatever imagined tactical or strategic trial reason, it is impossible, from the record, to ken." *State v. Cutcher*, 17 Ohio App. 2d 107, 110, 244 N.E.2d 767, 769 (1969). The court considered the prejudicial effect of the evidence and the fact that if the evidence were admissible for another purpose, the jury "was in the dark about it." *Id.* at 111, 244 N.E.2d at 769. The court further noted additional errors that occurred at trial as "other examples of trial counsel's questionable efficiency." *Id.* Finally, the court noted that where the defense is substantially weakened

because of an unawareness of a rule of law basic to the case, the accused is denied effective assistance of counsel. As a result, the court reversed the conviction.

Here, it is clear from a review of the record that everyone was on the wrong page. When discussing the initial objection to Bluhm's testimony, the discussion centered on the meaning of § 27-404(1). It is clear from the record that the court and the attorneys stopped their inquiry after reading that under § 27-404(1), the prosecution could rebut Faust's character evidence. They then made a mistake of law when they failed to consider § 27-405 to determine that the evidence could not be rebutted using specific instances of conduct. We further note that had the law been determined correctly the first time the issue was raised, the problem we face in this case would not exist.

We are also unable to conceive of any reasonable trial strategy when defense counsel would choose to allow a continuing stream of witnesses to testify about numerous bad acts of the defendant when such evidence has such a high potential to prejudice the jury against the defendant. We further note that no plausible strategy has been offered. Perhaps counsel may have been concerned that continuing to object to the evidence would emphasize the evidence to the jury. But such a strategy is not reasonable when the objectionable testimony is so extensive and damaging. Further, counsel could have requested a continuing objection. Regardless, a defendant has a right to be tried for the specific offense charged, and this cannot be waived. *United States v. Beno*, 324 F.2d 582 (2d Cir. 1963). When the inadmissible evidence that is presented has such a high level for jury prejudice and confusion, there is no strategy or reason for a defense attorney to sit back and allow such evidence to be heard without objection. Simply put, when the error was so egregious and resulted in such a high level of prejudice, no tactic or strategy can overcome the effect of the error, which effect was a fundamentally unfair trial. In that rare case, a determination of the issue of ineffective assistance of counsel does not require an evidentiary hearing.

Finally, as discussed later in this opinion, there were other errors at trial. In particular, we note the failure of Faust's counsel to object to a self-defense instruction when self-defense was not

the theory of her case, and we note the failure to object to the use of victim photographs. Faust also raised issues about prosecutorial misconduct and the cumulative effect of trial errors.

We recognize that rarely will a reviewing court be provided the opportunity to make a determination of ineffective assistance of counsel on direct appeal when the issue involves a failure to object to prejudicial evidence. See *Stone v. State*, 17 S.W.3d 348 (Tex. App. 2000). But where no plausible explanation for an attorney's actions exists, to require the defendant to file a postconviction action can be only a waste of judicial time. See *Jackson v. Leonardo*, 162 F.3d 81 (2d Cir. 1998). We conclude that this is one of those rare cases. The performance of Faust's counsel was deficient, and that deficiency prejudiced her defense in a manner that fundamentally denied her a fair trial. Here, no strategy can overcome the effect of the errors that occurred. Hence, an evidentiary hearing would not change the result, would be a waste of judicial resources, and would delay the State's opportunity to retry Faust. We conclude that Faust was denied effective assistance of counsel and that the deficiency prejudiced her case; thus we reverse, and remand for a new trial.

[30] For the same reasons that Faust was prejudiced by her counsel's failure to object, the error admitting Bluhm's testimony that was objected to was not harmless. An error in admitting or excluding evidence in a criminal trial, whether of constitutional magnitude or otherwise, is prejudicial unless it can be said that the error was harmless beyond a reasonable doubt. *State v. Lenz*, 227 Neb. 692, 419 N.W.2d 670 (1988).

[31] Harmless error review looks to the basis on which the jury actually rested its verdict; the inquiry is not whether in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error. *Sullivan v. Louisiana*, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993); *State v. Trotter*, 262 Neb. 443, 632 N.W.2d 325 (2001); *State v. Baue*, 258 Neb. 968, 607 N.W.2d 191 (2000). See, *State v. White*, 249 Neb. 381, 543 N.W.2d 725 (1996) (Gerrard, J., dissenting), *overruled on other grounds*, *State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998); *State v. Ryan*,

249 Neb. 218, 543 N.W.2d 128 (1996) (Gerrard, J., dissenting), *overruled on other grounds*, *State v. Burlison*, *supra*.

Here, we cannot say that the guilty verdict was unattributable to the error. Although there was strong evidence of guilt, Faust presented evidence to explain her version of what happened. The jury heard prejudicial evidence about specific instances of Faust's conduct, and much of that evidence was presented at the end of the trial. Faust is entitled to have the jury view the evidence as it relates to the crime charged and not tainted by extraneous evidence about specific instances of violent and aggressive behavior. We determine that Faust is entitled to a new trial.

SUFFICIENCY OF EVIDENCE

[32,33] Upon finding error in a criminal trial, the reviewing court must determine whether the evidence presented by the State was sufficient to sustain the conviction before the cause is remanded for a new trial. *State v. Haltom*, 263 Neb. 767, 642 N.W.2d 807 (2002); *State v. Anderson*, 258 Neb. 627, 605 N.W.2d 124 (2000). In *Lockhart v. Nelson*, 488 U.S. 33, 109 S. Ct. 285, 102 L. Ed. 2d 265 (1988), the Court held that the Double Jeopardy Clause does not forbid retrial so long as the sum of the evidence offered by the state and admitted by the trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict. See, *State v. Sheets*, 260 Neb. 325, 618 N.W.2d 117 (2000), *cert. denied* 532 U.S. 1019, 121 S. Ct. 1957, 149 L. Ed. 2d 753 (2001); *Anderson*, *supra*. We conclude that Faust can be retried without a violation of double jeopardy because the evidence was sufficient to sustain her conviction.

OTHER ASSIGNMENTS OF ERROR

Although we have determined that Faust's convictions must be reversed and the cause remanded for a new trial, because some of her remaining assignments of error are likely to recur during retrial, we address those issues. See, e.g., *State v. Harney*, 237 Neb. 512, 466 N.W.2d 540 (1991). Generally, Faust's remaining assignments of error involve evidentiary issues that were not objected to. Thus, Faust contends that she was denied effective assistance of counsel. Although we have concerns about the nature of some of these issues, we address these issues solely to prevent errors on retrial and do not decide whether Faust was

actually denied effective assistance of counsel or if any of the errors were harmless. We do not address additional assignments of error that are unlikely to reoccur on retrial.

SELF-DEFENSE INSTRUCTION

Faust contends that the court erred by instructing the jury on self-defense when her theory of the case was that she did not commit the crimes.

[34-39] We have stated that a trial court must instruct the jury on the issue of self-defense when there is any evidence adduced which raises a legally cognizable claim of self-defense. *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999); *State v. Kinser*, 252 Neb. 600, 567 N.W.2d 287 (1997). To successfully assert the claim of self-defense, a defendant must have a reasonable and good faith belief in the necessity of using force and the force used in defense must be immediately necessary and justified under the circumstances. *Urbano, supra*; Neb. Rev. Stat. § 28-1409 (Reissue 1995). Justifications for the use of force in self-defense are statutorily defined. See § 28-1409. The defendant bears the initial burden to produce evidence which supports a claim of self-defense. *Urbano, supra*. We have stated that if the trial evidence does not support a claim of self-defense, the jury should not be instructed on it. *Id.* An instruction which does not correctly state the law or which is likely to confuse or mislead the jury should not be given. *Id.*

The Supreme Court of Massachusetts has addressed the question whether a defendant may veto a self-defense instruction when the theory of the case was that the defendant did not commit the crime, but evidence introduced by the state might warrant an instruction. *Commonwealth v. Souza*, 428 Mass. 478, 702 N.E.2d 1167 (1998). In *Souza*, self-defense was not the theory of the defendant's case. The court noted that a trial court must instruct on self-defense when the evidence most favorable to the defendant warrants a reasonable doubt whether the defendant acted in self-defense. The court stated that a defendant's trial strategy should be respected. The court noted that there was also no request from the defendant or the state to give the instruction. The court, however, determined that the defendant was not prejudiced by the instruction. Other courts have also determined that it

is error to instruct on self-defense when it is not the theory of the defendant's case and there is no evidence to support an instruction. See, *People v. Silver*, 16 Cal. 2d 714, 108 P.2d 4 (1940); *People v. Griner*, 30 Mich. App. 612, 186 N.W.2d 800 (1971); *Whisenhunt v. State*, 279 P.2d 366 (Okla. Crim. App. 1954).

Here, Faust did not assert self-defense and did not seek to produce evidence to support a self-defense instruction. Instead, her theory of the case was that she did not commit the crimes and that Bruce was the perpetrator. The initial burden of proof is on the defendant to produce evidence to support a self-defense claim. Faust made no effort to meet her burden of proof to support a self-defense instruction because it was not her theory of the case. Thus, there was no support for a self-defense instruction.

The State presented evidence that Faust had told Borden that she and Shannon scuffled, that Shannon got "cut," and that the gun went off. But this evidence was not presented to either prove or disprove a self-defense claim. Rather, the State presented the evidence to show that Faust had told inconsistent stories about the events of the night of the murders. Without Faust's seeking to assert a theory of self-defense, this evidence does not warrant a self-defense instruction.

We determine that when the defendant makes no effort to meet the initial burden of proof to prove self-defense and when self-defense is not the defendant's theory of the case, a self-defense instruction is not warranted. A theory of self-defense necessarily involves an inference or admission that the defendant harmed the victim, but that the defendant's acts were justified. By giving a self-defense instruction when the defendant's theory of the case is that he or she did not commit the crime, the court risks confusing or misleading the jury. We conclude that the court erred by giving a self-defense instruction and that Faust's attorney should have objected to the instruction. Instead, Faust's attorney asked for an additional self-defense instruction. If the issue whether to give a self-defense instruction arises on retrial, an instruction should not be given if it is not warranted by Faust's evidence.

VICTIM PHOTOGRAPHS

Faust next contends that the court erred in allowing into evidence photographs of the victims taken when they were alive.

During trial, Desiree identified a photograph of Robert that was taken when he was alive. The photograph depicts Robert sitting on a couch with his arm around a dog. She also identified a photograph that was taken of Robert's body after his death. The State asked her if Robert had the injuries depicted in the photograph when he left the house on April 25, 2000. Desiree answered "[n]o."

Shannon's mother also identified a photograph of Shannon that was taken when she was alive. She also identified Shannon in a photograph taken after her death. The photographs were entered into evidence without objection.

[40-42] The admission of photographs into evidence rests largely within the discretion of the trial court, which must determine their relevancy and weigh their probative value against their possible prejudicial effect. *State v. Clark*, 255 Neb. 1006, 588 N.W.2d 184 (1999). See § 27-403. In a homicide prosecution, photographs of a victim may be received into evidence for purposes of identification, to show the condition of the body or the nature and extent of wounds and injuries to it, and to establish malice or intent. *Clark, supra*. We have held that a photograph which is admitted at trial depicting a victim while he or she was alive is not offered for a proper purpose. *Id.*

Here, the photographs of the victims depicting them when they were alive were not relevant to show the condition of the body or the extent of the wounds, or to establish malice or intent. The State contends that the photographs were necessary for identification, but this argument ignores that both victims were identified in photographs taken after their deaths. We conclude that the photographs were not offered for a proper purpose. Photographs of the victims taken when they were alive should not be allowed into evidence on retrial.

FAUST'S STATEMENT "IT'S MY DOING"

Faust contends that she was entitled to a hearing under *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964), to determine whether her statement "it's my doing" was voluntarily made. The State contends that the issue was waived because Faust failed to move to suppress the statement. In the alternative, the State contends that a hearing was not required

because the statement was not made to law enforcement officers and was properly used on rebuttal to impeach Faust's assertion that she did not commit the crimes.

Before trial, the court held a *Jackson v. Denno* hearing about various statements Faust made to Bergman when he first went to Faust's residence. The court determined that the statements could be used at trial because Faust was not in custody at the time she made the statements and the statements were voluntarily made.

At trial, Bergman testified that while he was at Faust's residence, Faust voluntarily provided information about what she had done on April 25, 2000. She told him that she had taken a bicycle ride and that Shannon had picked her up.

A deputy with the Otoe County Sheriff's Department testified about a statement he overheard Faust make at her home during the early morning hours of April 26, 2000. He testified that he was in the kitchen with Faust and Borden and heard Faust say, "It's not your fault, it's my doing." On cross-examination, he testified that right before Faust's statement, Borden said, "This is my fault, I shouldn't have talked you out of moving." Faust's attorney objected to the testimony, stating that his understanding was that only Bergman was going to testify about statements volunteered by Faust and that the statement the deputy overheard was subject to a *Jackson v. Denno* hearing. The State responded that it told Faust's attorney that the statement might be used in rebuttal and argued that a *Jackson v. Denno* hearing was not needed for rebuttal evidence. The court overruled the objection without explaining its reasoning.

[43-48] Admission of an involuntary confession is precluded by the Due Process Clause of U.S. Const. amend. XIV and the due process clause of Neb. Const. art. I, § 3. *State v. Harris*, 263 Neb. 331, 640 N.W.2d 24 (2002). To be admissible, a statement or confession of an accused must have been freely and voluntarily made. *Id.* A defendant who objects to the voluntariness of a statement is entitled to a hearing in which both the underlying factual issues and the voluntariness of the statement are actually and reliably determined. See, *Jackson, supra*; *Harris, supra*. An accused may move for suppression of a statement that he or she claims is involuntary. *Harris, supra*. An objection to such a statement is waived if it is not raised by motion before trial, with the

exception that a court may entertain motions to suppress after the commencement of trial when the defendant is surprised by the statements introduced by the State. *Id.*; Neb. Rev. Stat. § 29-115 (Cum. Supp. 2002). We review the determination whether to entertain a motion to suppress made after the commencement of trial for an abuse of discretion. *Harris, supra*.

[49,50] A *Jackson v. Denno* hearing may be appropriate even when the allegedly involuntary statement is made during rebuttal. *Loftin v. State*, 180 Ga. App. 613, 349 S.E.2d 777 (1986). A *Jackson v. Denno* hearing is not required for a statement that is being introduced solely for impeachment purposes, but the defendant may be entitled to a determination of voluntariness by the trial court, although not necessarily in the context of a *Jackson v. Denno* hearing. *Id.* Under § 29-115, a court may entertain a motion to suppress after the commencement of trial when the defendant is surprised or was previously unaware of the grounds for the motion. The decision to entertain the motion, however, is at the trial court's discretion. *Harris, supra*.

Here, we are unable to determine from the record whether the court denied Faust's request for a hearing because it erroneously believed that a *Jackson v. Denno* hearing was never required for rebuttal evidence or because it had decided in its discretion to deny the motion despite Faust's contentions of surprise about the testimony. Nor is it clear from the record that the statement was introduced solely for impeachment purposes. Because we are unable to make these determinations, we do not consider the issue to be waived, and we address Faust's arguments.

[51] We have held that an accused's statement, whether an admission or a confession, made to private citizens, as well as to law enforcement personnel, must be voluntary as determined by a court for admissibility and as a fact ascertained by the jury. *State v. Kula*, 260 Neb. 183, 616 N.W.2d 313 (2000). That Faust made the statement to Borden does not preclude the need for a hearing.

Had Faust raised the issue before trial in a motion to suppress, she would have been entitled to a hearing. But because she waited to raise the issue, the court could entertain or deny the motion at its discretion. But we are unable to tell from the record whether the trial court properly considered Faust's claim of surprise when it chose to deny the motion. We note that the court would not have

abused its discretion by denying the hearing. Faust does not contend that her statement was involuntary. Instead, she sought a hearing without ever alleging any specific instances of coercion. In addition, other statements made by Faust around the same time and under the same circumstances were found to be voluntary. Further, when taken in the context of the entire conversation between Faust and Borden, it would have been reasonable for the court to question whether the statement was an admission at all. Finally, the trial court could have questioned whether Faust was actually surprised by the testimony about her statement. While Faust claimed to be surprised by the introduction of the statement, the State alleged that it had informed the defense that the statement might be used on rebuttal. Thus, it would have been reasonable for the court to deny the hearing.

We conclude that on retrial, issues regarding the voluntariness of Faust's statement should be addressed before trial. If Faust fails to raise the issue before trial, the court should either hold a hearing if one is later requested or explain its reasons if a hearing is denied.

EVIDENCE OF BORDEN'S CHARACTER

Faust contends that the court erred in allowing testimony about Borden's character for peacefulness. There was no objection to the testimony. We note that Faust raised the issue first when Seip provided testimony that Bruce physically abused Faust. As a result, Seip testified that she heard Borden state that he would "bury" Bruce if he touched Faust again. The State then explored the issue further on cross-examination of both Seip and Borden. We do not address this issue on appeal, but should the issue arise again on retrial, we caution the attorneys and the court to consider the purpose for which the testimony is offered and whether the testimony is admissible under Neb. Rev. Stat. § 27-608 (Reissue 1995).

CONCLUSION

We conclude that the district court erred in allowing testimony about a specific instance in which Faust acted in a violent and threatening manner. We further conclude that Faust was denied effective assistance of counsel because there were no objections to evidence of numerous additional instances of Faust's conduct.

The admission of the evidence and the ineffective assistance of trial counsel were prejudicial to Faust's defense and resulted in a fundamentally unfair trial. As a result, she is entitled to a new trial. Faust raised additional assignments of error that we do not address, including a charge of prosecutorial misconduct and an argument that the cumulative effect of the errors at trial or instances of ineffective assistance of counsel denied her right to due process. While we do not specifically address those assignments of error, we note that we have addressed a number of issues that may arise on retrial.

REVERSED AND REMANDED FOR A NEW TRIAL.

STEPHAN, J., dissenting.

I respectfully dissent. In my view, the trial record affords an insufficient basis for determining whether trial counsel for Kimberly Sue Faust was constitutionally ineffective, and therefore I would not reach that issue in this direct appeal. Because I perceive no prejudicial error occurring at trial, I would affirm.

The majority concludes that reversal is necessary because the trial court received certain testimony which the majority determines to be inadmissible under the statutory rules of evidence which govern criminal trials in Nebraska. However, those rules provide in part:

(1) Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and:

(a) In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if a specific ground was not apparent from the context[.]

Neb. Rev. Stat. § 27-103 (Reissue 1995). From this rule, we derive a basic tenet of appellate review that a prerequisite to an appeal based upon error in the admission of evidence is a timely objection stating the grounds therefor, unless the grounds are apparent from the context. *State v. Harris*, 263 Neb. 331, 640 N.W.2d 24 (2002). The failure to make a timely and proper objection or motion to strike will ordinarily bar a party from later claiming error in the admission of testimony. *Id.* Put simply, no trial error ordinarily results from receiving evidence to which there is no objection.

With a single exception, there was no objection to the testimony on which the majority predicates reversible error. The majority bridges this gap by accepting Faust's argument that her trial counsel performed in a constitutionally deficient manner by failing to object, thereby enabling the majority to consider whether an objection, if made, would have resulted in exclusion of the evidence. The majority acknowledges the well-established principle that where ineffective assistance of counsel is claimed, there is a strong presumption that counsel acted reasonably. See, *State v. Zarate*, 264 Neb. 690, 651 N.W.2d 215 (2002); *State v. Al-Zubaidy*, 263 Neb. 595, 641 N.W.2d 362 (2002). Under this principle, trial counsel is afforded due deference to formulate trial strategy and tactics, and an appellate court will not second-guess reasonable strategic decisions made by counsel. *State v. Al-Zubaidy*, *supra*; *State v. Buckman*, 259 Neb. 924, 613 N.W.2d 463 (2000). The decision whether to object or not to specific questions posed to a witness is a strategic decision made by trial counsel to which this rule applies. *State v. Williams*, 259 Neb. 234, 609 N.W.2d 313 (2000).

Today, for the first time in our jurisprudence, this court determines from a record on direct appeal that defense counsel was constitutionally deficient in not making certain evidentiary objections at trial. The majority concludes that it is "unable to conceive of any reasonable trial strategy" which would have supported a decision not to object to the questions which elicited testimony regarding Faust's actions toward her estranged husband, Bruce Faust, and Shannon Bluhm during the period of their extramarital relationship. This reasoning ignores the reality that trial strategy is often shaped by factors known to trial counsel which do not necessarily appear in the record on direct appeal and are, therefore, unknown to a reviewing court.

Evidence introduced during a criminal trial "will be devoted to issues of guilt or innocence, and the resulting record in many cases will not disclose facts necessary to decide either prong of the *Strickland* analysis." *Massaro v. United States*, No. 01-1559, 2003 WL 1916677 at *4 (U.S. Apr. 23, 2003). Although the U.S. Supreme Court acknowledged in *Massaro* that there may be cases in which a claim of ineffective assistance of counsel could be resolved on the basis of the appellate record, it also reasoned that

“few such claims will be capable of resolution on direct appeal,” 2003 WL 1916677 at *6, and that the “better-reasoned approach” is to permit ineffective assistance claims to be asserted in the first instance in a collateral proceeding under 28 U.S.C. § 2255 (2000), the federal postconviction remedy, 2003 WL 1916677 at *3. The Court reasoned that “in most cases a motion brought under § 2255 is preferable to direct appeal for deciding claims of ineffective-assistance,” noting that a collateral postconviction proceeding affords “the forum best suited to developing the facts necessary to determining the adequacy of representation during an entire trial.” *Massaro*, 2003 WL 1916677 at *4.

Indeed, while we may consider and resolve claims of ineffective assistance of trial counsel asserted on direct appeal, we frequently decline to do so because the record is insufficient to permit meaningful review. See, e.g., *State v. Long*, 264 Neb. 85, 645 N.W.2d 553 (2002); *State v. McLemore*, 261 Neb. 452, 623 N.W.2d 315 (2001); *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998), *modified on denial of rehearing* 255 Neb. 889, 587 N.W.2d 673 (1999). In the limited number of cases in which we or the Nebraska Court of Appeals have reached the issue of ineffective assistance of counsel on direct appeal, the record presented questions of law, not questions of trial strategy. *State v. Cody*, 248 Neb. 683, 539 N.W.2d 18 (1995) (finding because defendant lacked reasonable expectation of privacy with respect to areas searched, counsel not deficient in handling motion to suppress); *State v. Morley*, 239 Neb. 141, 474 N.W.2d 660 (1991) (finding evidence sufficient to support charge and thus counsel not deficient in failing to move for directed verdict), *abrogated on other grounds*, *State v. Pierce*, 248 Neb. 536, 537 N.W.2d 323 (1995); *State v. Fletcher*, 8 Neb. App. 498, 596 N.W.2d 717 (1999) (finding enhancement evidence reliable as matter of law and thus counsel not deficient in offering additional evidence on subject). Where claims of ineffective assistance of counsel are dependent upon facts which do not appear in the trial record, Nebraska appellate courts consistently defer resolution to postconviction review. See, *State v. Hert*, 192 Neb. 751, 224 N.W.2d 188 (1974) (declining to reach on direct appeal whether counsel deficient in failing to file motion to discharge); *State v. Kellogg*, 10 Neb. App. 557, 633 N.W.2d 916 (2001)

(declining to reach on direct appeal whether counsel deficient in forgoing presentence investigation).

I see no reason in this case to depart from this sound practice. In my view, the strong presumption that trial counsel acted reasonably cannot be overcome by speculation regarding strategy. Thus, whether a court can or cannot examine the trial record and “conceive” of a reason why defense counsel did not object to certain questions during trial is not the issue. On direct appeal, a reviewing court “may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive or was taken because the counsel’s alternatives were even worse.” *Massaro*, 2003 WL 1916677 at *4. Without knowing the reasons, and strategic considerations, if any, upon which defense counsel acted or refrained from acting, we are simply not in a position to judge whether counsel’s performance was constitutionally deficient. This determination will ordinarily require consideration of facts extrinsic to the trial record. Our statutory postconviction remedy, which is designed to determine whether a conviction should be set aside because it was obtained through a denial or infringement of the constitutional rights of the accused, specifically provides for an evidentiary hearing where a proper allegation of denial of constitutional rights cannot be refuted by the files and records of the original prosecution. Neb. Rev. Stat. § 29-3001 (Reissue 1995). See, also, *State v. Nesbitt*, 264 Neb. 612, 650 N.W.2d 766 (2002); *State v. Caddy*, 262 Neb. 38, 628 N.W.2d 251 (2001). In a case such as this, where, in my view, the trial record does not clearly establish or refute a claim of deficient performance of counsel, the presumption that counsel acted reasonably is not overcome on direct appeal. A subsequent postconviction proceeding affords a more complete and objective basis for deciding the issue. I would therefore decline to reach the claims of ineffective assistance of trial counsel on this direct appeal.

The only assigned error preserved by a trial objection involved the testimony of Jeff Bluhm (Bluhm) regarding a confrontation between Faust and Shannon in January or February 2000. I agree with the majority that this testimony was not admissible on the narrow issue of Faust’s character under Neb. Rev. Stat. § 27-405 (Reissue 1995). While I believe that this evidence may have been

independently relevant on the issue of Faust's motive, and thus admissible under Neb. Rev. Stat. § 27-404(2) (Reissue 1995), it was ultimately not offered for this purpose, and the procedures outlined in *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999), were not followed. Nevertheless, I conclude that the error in admitting Bluhm's testimony was harmless beyond a reasonable doubt.

Harmless error review looks to the basis on which the jury actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error. *State v. Duncan*, ante p. 406, 657 N.W.2d 620 (2003); *State v. Brouillette*, ante p. 214, 655 N.W.2d 876 (2003). Based upon my review of the record, I am satisfied that the guilty verdict was surely unattributable to the erroneous admission of evidence relating to Faust's confrontation with Shannon several weeks prior to the homicides. I reach this conclusion for two reasons.

First, to the extent that the evidence in question raised an inference that Faust is a person capable of violence, it is cumulative. As the majority acknowledges, Faust admitted that the physical abuse in her marriage sometimes "went both ways" and admitted to incidents in which she was physically aggressive toward Bruce.

More importantly, however, I regard the admission of the character evidence as harmless because the record reflects overwhelming evidence of guilt which is not in any way dependent upon character evidence. Utilizing DNA evidence, the State proved that blood found on the exterior and interior of the driver's side of Faust's vehicle was that of the victims. It is undisputed that the fatal shots were fired from the handgun which was in Faust's possession before and after the crimes were committed. Faust admitted that she was present when the shootings occurred and that the shots were fired from the handgun that she carried in her vehicle.

Faust's defense was that Bruce shot the victims while she helplessly watched. The State was able to substantially impeach this testimony without resort to Bluhm's testimony. On cross-examination, Faust admitted that her trial testimony was inconsistent with two prior accounts she had given regarding the

events at the crime scene. The State was also able to establish inconsistencies between Faust's trial testimony and certain known time sequences. According to Faust's testimony, she and Shannon arrived at the rural location where Faust had left her vehicle sometime after 9:20 p.m. This location was approximately 5 miles from Eagle. Faust testified that as she and Shannon sat and talked in Shannon's vehicle, Bruce arrived and entered the vehicle from the front driver's side. Faust testified that she and Bruce had an argument at that time which led to a physical altercation occurring inside the vehicle between the three of them. Faust testified that she then exited the vehicle, entered her own vehicle, and drove a short distance away. After several minutes, Faust returned to the area where Shannon's vehicle was parked and observed that the vehicle was on fire.

Bruce denied committing the murders. In direct contrast to Faust's testimony, telephone records reveal that Bruce was at his home in Eagle talking to his daughter on the telephone between 9:22 and 9:29 p.m. Witnesses observed the burning vehicle between 9:25 and 9:35 p.m. Desiree Parminter reported the burning vehicle in a 911 emergency dispatch call to the Otoe County sheriff's office that was received at approximately 9:43 p.m. On this evidence, the jury could reasonably have chosen not to believe that Bruce traveled approximately 5 miles from his home to the crime scene, entered Shannon's vehicle, engaged in a physical altercation with Faust and Shannon in the vehicle, and then set fire to Shannon's vehicle, all within what at most would amount to a 14-minute time period. Most importantly, the jury could have arrived at such conclusion without considering the erroneously admitted character evidence in any manner.

For these reasons, I would affirm the judgment of the district court.

HENDRY, C.J., joins in this dissent.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE
OF THE NEBRASKA SUPREME COURT, RELATOR, V.
STANFORD L. SIPPLE, RESPONDENT.
660 N.W.2d 502

Filed May 9, 2003. No. S-02-460.

1. **Disciplinary Proceedings: Proof: Appeal and Error.** A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee; provided, however, that where the credible evidence is in conflict on a material issue of fact, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Disciplinary Proceedings: Proof.** To sustain a charge in a disciplinary proceeding against an attorney, a charge must be established by clear and convincing evidence.
3. **Attorneys at Law.** An attorney is expected to use legal means to enforce his or her rights, not violent threats.
4. _____. Hostile, threatening, and disruptive conduct reflects on an attorney's honesty, trustworthiness, diligence, and reliability.
5. **Constitutional Law: Attorneys at Law.** Assertions of an attorney's right to free speech require a delicate balancing of the interests in upholding the integrity of our judicial system and in protecting the right of an attorney to free expression.
6. **Attorney and Client.** There is a distinction between professional employment and professional relationship. A lawyer owes a duty to a client in the context of a professional relationship long after the professional employment has terminated.
7. **Disciplinary Proceedings.** The basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.
8. _____. Each case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case.
9. _____. To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, we consider the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance and reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law.
10. _____. Cumulative acts of attorney misconduct are distinguishable from isolated incidents, therefore justifying more serious sanctions.

Original action. Judgment of suspension.

Kent L. Frobish, Assistant Counsel for Discipline, for relator.

Robert B. Creager, of Anderson, Creager & Wittstruck, P.C.,
for respondent.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, McCORMACK,
and MILLER-LERMAN, JJ.

PER CURIAM.

I. NATURE OF CASE

This is an action brought by the Counsel for Discipline of the Nebraska Supreme Court seeking the imposition of discipline against respondent, Stanford L. Sipple, a member of the Nebraska State Bar Association. Respondent was formally charged with violating certain disciplinary rules and his oath of office as an attorney in connection with his representation of Brian Husted. A hearing was held, and the referee found that respondent had violated the Code of Professional Responsibility. The referee made no finding as to whether respondent had violated his oath as an attorney. See Neb. Rev. Stat. § 7-104 (Reissue 1997). The referee recommended that respondent be suspended from the practice of law for 1 year. Respondent filed exceptions to the referee's report. Following our de novo review of the record, we agree with the referee's findings of fact and conclusions of law. We also conclude respondent violated his oath of office as an attorney. We reject the referee's recommended 1-year suspension and instead suspend respondent from the practice of law for 2 years.

II. STATEMENT OF FACTS

The substance of the referee's findings, with which we agree, may be summarized as follows: On November 14, 1998, respondent entered into a fee agreement to represent Brian in a workers' compensation claim against Duncan Aviation. Brian had allegedly sustained a serious head injury arising out of and in the course of his employment. Respondent filed a workers' compensation lawsuit on behalf of Brian against Duncan Aviation, and the matter was scheduled to go to trial on March 2, 2001. Immediately prior to trial, the parties engaged in settlement discussions. The referee found that during these negotiations, respondent "failed, despite the request of [Brian], to put a settlement demand of \$185,000.00 or \$165,000.00 to the [employer's] attorney." Apparently, the parties arrived at the figure of \$150,000 to resolve the case. Cheryl Husted, Brian's wife, claims, however, that immediately after reaching this figure, she and Brian advised respondent that they did not want to settle the case for \$150,000. Cheryl claims respondent advised her that there was nothing that could be done. The referee concluded that

the Husteds “felt that they were pressured to accept the \$150,000.00 settlement.”

On March 15, 2001, Brian was given a copy of the settlement documents by respondent’s office. On March 16, Cheryl advised respondent that Brian needed more time to review the paperwork. In his report, the referee stated that Cheryl’s request for more time “incensed [respondent, who] insisted that the settlement documents be executed by the Husteds and returned to his office later [that same day] or he would take steps to nullify the settlement.” The referee found that on March 16, respondent left a telephone message for Brian, stating, “ ‘I’ll give you this one last chance. You be in here on Monday [March 19, 2001] before twelve noon and ready to sign these documents or I will go to [Duncan Aviation’s attorney.] This is your last chance.’ ”

Also on March 16, 2001, respondent advised Cheryl that he was driving to the Husteds’ house to speak with Brian directly, despite Cheryl’s request that respondent not do so because Brian was ill. Later that same day, respondent drove to the Husteds’ home and confronted Brian about the settlement documents. The referee’s report stated that during their conversation, respondent “became abusive,” inquiring whether Brian needed a guardian and challenging Brian to settle the case “ ‘like a man.’ ” The referee reported that “[a]ll of this, to say the least, was upsetting to the Husteds.”

On March 19, 2001, the Husteds terminated their employment of respondent and hired a new attorney to handle Brian’s workers’ compensation claim. Thereafter, respondent took several actions which the referee determined could “only be described as a campaign to intimidate the Husteds and force an early payment of his [attorney] fee,” even though there was no dispute about respondent’s right to collect a fee. Despite the ongoing nature of Brian’s workers’ compensation claim, respondent scheduled the depositions of the Husteds. He also served them with requests for admissions. Additionally, on May 2, and again on May 17, respondent contacted Duncan Aviation’s workers’ compensation lawyer. The record reflects that in one conversation, respondent stated to Duncan Aviation’s lawyer that “he did not want [Brian] to receive any more than \$150,000 in settlement.” Respondent also contacted by e-mail the workers’ compensation judge assigned to

Brian's case. According to the referee's report, in the e-mail, respondent stated to the judge that he saw "'little harm that could be done to [Brian's] case by answering [respondent's] discovery [regarding attorney fees], other than his avoiding the truth.'"

In his report, the referee observed that respondent "took offense at a certain Response to [respondent's] Requests For Admissions supplied by [Brian] and his [new] lawyer." As a result of this "offense," respondent threatened to prosecute Brian for perjury. The record reflects that in a facsimile transmitted to the Husteds' new attorney, respondent wrote "I will pursue perjury because it is perjury. . . . Make truthful statements or I will take matter further."

On August 24, 2001, the Husteds' new attorney settled Brian's workers' compensation claim against Duncan Aviation for \$200,000. On October 15, this new attorney filed a grievance with the Counsel for Discipline's office against respondent relating to respondent's actions involving the Husteds. On April 30, 2002, a single-count formal charge was filed against respondent alleging that as a result of his actions, respondent had violated the following disciplinary rules:

DR 1-102 Misconduct.

(A) A lawyer shall not:

(1) Violate a Disciplinary Rule.

. . . .

(5) Engage in conduct that is prejudicial to the administration of justice. . . .

(6) Engage in any other conduct that adversely reflects on his or her fitness to practice law.

DR 7-101 Representing a Client Zealously.

(A) A lawyer shall not intentionally:

. . . .

(3) Prejudice or damage his or her client during the course of the professional relationship

DR 7-105 Threatening Criminal Prosecution.

(A) A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

On June 7, respondent filed an answer to the formal charges, admitting certain of the allegations, but denying that he had

violated either the disciplinary rules or his oath as an attorney. On June 12, this court appointed a referee to serve in the case. A referee hearing was held on October 4, at which hearing evidence was adduced regarding the facts recited above and argument was presented. The record also discloses that respondent had been the subject of two prior reprimands.

On November 8, 2002, the referee filed his report and found by clear and convincing evidence that respondent had violated Canon 1, DR 1-102(A)(1), (5), and (6), and Canon 7, DR 7-101(A)(3) and DR 7-105(A). In his report, the referee also noted that respondent had been the subject of a prior disciplinary proceeding "for behavior of the same type." In one of the two prior disciplinary proceedings, respondent had received a private reprimand after leaving verbally abusive messages on his clients' answering machines when the clients indicated some concern with regard to a settlement respondent had negotiated. With respect to the sanction which ought to be imposed for the violations established by the record, and considering respondent's prior disciplinary history, the referee recommended that respondent be suspended from the practice of law in the State of Nebraska for 1 year. On November 18, respondent filed exceptions to the referee's report.

III. ASSIGNMENTS OF ERROR

In his brief, respondent assigns five errors, which we restate as four. Respondent claims, restated, that (1) the evidence was insufficient as a matter of fact and law to support the conclusion that he violated DR 1-102(A)(5) and (6); (2) the evidence was insufficient as a matter of fact and law to support the conclusion that he violated DR 7-101(A), in part because certain statements respondent made were protected speech, privileged under the First Amendment to the U.S. Constitution and article I, § 5, of the Nebraska Constitution; (3) the evidence was insufficient as a matter of fact and law to support the conclusion that he violated DR 7-105(A); and (4) the punishment was excessive.

IV. STANDARD OF REVIEW

[1,2] A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee; provided, however, that where the credible evidence is in conflict on a

material issue of fact, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another. *State ex rel. NSBA v. Gallner*, 263 Neb. 135, 638 N.W.2d 819 (2002). To sustain a charge in a disciplinary proceeding against an attorney, a charge must be established by clear and convincing evidence. *State ex rel. Counsel for Dis. v. Petersen*, 264 Neb. 790, 652 N.W.2d 91 (2002); *State ex rel. Counsel for Dis. v. Brinker*, 264 Neb. 478, 648 N.W.2d 302 (2002).

V. ANALYSIS

1. VIOLATION OF DISCIPLINARY RULES AND ATTORNEY'S OATH

(a) DR 1-102(A)(5) and (6)

For his first assignment of error, respondent challenges the referee's conclusion that respondent violated DR 1-102(A)(5) and (6). In his brief, respondent admits that his "final efforts to consummate the settlement and resolve the fee dispute [were] probably 'out of bounds.'" Brief for respondent at 7. Nonetheless, respondent argues that such conduct does not amount to "conduct that is prejudicial to the administration of justice," see DR 1-102(A)(5), or "conduct that adversely reflects on [respondent's] fitness to practice law," see DR 1-102(A)(6). We disagree.

Initially, we note that respondent's prior disciplinary proceeding involving his leaving abusive messages on his clients' answering machines resulted in respondent's receiving a private reprimand for violating DR 1-102(A)(1), (5), and (6); the same rules respondent claims he did not violate in the instant case. We also note the similarity between respondent's conduct in his prior disciplinary proceeding and certain of the actions in which respondent engaged in the instant case.

Based on our de novo review of the record, it is clear that the record in the instant case contains overwhelming evidence that respondent was abusive to a client in an attempt to coerce the client into accepting a settlement which the client was not prepared to accept and in an attempt to collect an attorney fee. The record reflects that respondent left a threatening message on the Husted's answering machine. The record also demonstrates that despite Cheryl's request that Brian be given more time to review the settlement documents, respondent stated that he would

“nullify” the settlement if Brian did not execute the documents immediately. The referee found that respondent confronted Brian at his home, notwithstanding Cheryl’s specific request that respondent not come to the house because Brian was too ill. During the confrontation which ensued, the record reflects that respondent verbally abused his own client who had sustained a severe head injury, threatened Brian that he needed a guardian, and challenged Brian to settle the case “‘like a man.’”

Respondent continued his abusive behavior, aggressively pursuing his claim to a legal fee that was not in dispute, at a time when Brian’s workers’ compensation case had not concluded. The referee found respondent’s actions to be a “campaign to intimidate the Husteds.” During this “campaign,” the record reflects that respondent contacted Duncan Aviation’s attorney, stating that “he did not want [Brian] to receive any more than \$150,000 in settlement.” Respondent also contacted the judge assigned to hear Brian’s workers’ compensation case by e-mail and in that message, challenged Brian’s willingness to tell the truth. The referee found that respondent threatened to prosecute Brian for perjury for a matter which respondent admitted had no bearing on his claim for an attorney fee.

[3,4] We have previously stated that an attorney is expected to use legal means to enforce his or her rights, not violent threats. See *State ex rel. Counsel for Dis. v. Lopez Wilson*, 262 Neb. 653, 634 N.W.2d 467 (2001). In *Lopez Wilson*, the respondent engaged in a course of conduct in which he, inter alia, personally confronted his client at the client’s home in a hostile manner, threatened his client that he would alert the court that the client had not been truthful, and contacted an opposing party with information potentially damaging to the client’s case, all in an attempt, in part, to collect a legal fee. We concluded that the respondent’s conduct had a negative effect on the public’s perception of attorneys and the Nebraska State Bar Association in general. We further stated that “[w]ith regard to the protection of the public . . . ‘“‘courts have a duty to maintain public confidence in the legal system and to protect and enhance the attorney-client relationship in all its dimensions.’”’” *Id.* at 661, 634 N.W.2d at 474 (quoting *State v. Hawes*, 251 Neb. 305, 556 N.W.2d 634 (1996)). We determined that the respondent’s threats undermined the confidential and

fiduciary nature of the attorney-client relationship and lessened the public's confidence in the legal profession. We also stated that hostile, threatening, and disruptive conduct reflects on an attorney's honesty, trustworthiness, diligence, and reliability. We concluded that an attorney's conduct which includes progressively abusive language and threats "violate[d] disciplinary rules that prohibit engaging in conduct prejudicial to the administration of justice and engaging in conduct that adversely reflects on one's fitness to practice law." *Id.* at 662, 634 N.W.2d at 475.

Based on our de novo review of the record, see *State ex rel. NSBA v. Gallner*, 263 Neb. 135, 638 N.W.2d 819 (2002), we conclude that the record in the instant case establishes by clear and convincing evidence that respondent engaged in conduct that was prejudicial to the administration of justice and that adversely reflected on respondent's fitness to practice law, in violation of DR 1-102(A)(1), (5), and (6).

(b) DR 7-101(A)(3)

For his second assignment of error, respondent challenges the referee's conclusion that respondent violated DR 7-101(A)(3) by engaging in conduct that was prejudicial or damaging to Brian during the course of the professional relationship. In support of this assignment of error, respondent raises two arguments. First, respondent claims that certain of his actions are protected by his federal and state constitutional rights to free speech, and thus cannot serve as a basis for an attorney disciplinary proceeding. Second, respondent claims that his actions involved a "former client," and thus, did not occur "'during the course of the professional relationship.'" Brief for respondent at 13. We find no merit to this assignment of error.

[5] Initially, we note that we have previously recognized that assertions of an attorney's right to free speech require "a delicate balancing of the interests in upholding the integrity of our judicial system and in protecting the right of an attorney to free expression." *State ex rel. Nebraska State Bar Assn. v. Michaelis*, 210 Neb. 545, 555, 316 N.W.2d 46, 52 (1982). Nonetheless, we have recognized that "instances can exist where an attorney's criticism or conduct would be impermissible and the subject of professional discipline." *Id.* at 556, 316 N.W.2d at 53. In

Michaelis, we concluded that notwithstanding an attorney's claim that his conduct was protected by his constitutionally guaranteed right to free speech, the record demonstrated that the attorney's statements were unethical and unprofessional and in violation of the Code of Professional Responsibility. In reaching this conclusion, we quoted Justice Stewart of the U.S. Supreme Court, who, in a concurring opinion speaking for five members of the Court, stated:

"If, as suggested by [Justice] Frankfurter, there runs through the principal opinion an intimation that a lawyer can invoke the constitutional right of free speech to immunize himself from even-handed discipline for proven unethical conduct, it is an intimation in which I do not join. A lawyer belongs to a profession with inherited standards of propriety and honor, which experience has shown necessary in a calling dedicated to the accomplishment of justice. He who would follow that calling must conform to those standards.

"Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech."

(Emphasis omitted.) *Id.* at 556-57, 316 N.W.2d at 53 (quoting *In re Sawyer*, 360 U.S. 622, 79 S. Ct. 1376, 3 L. Ed. 2d 1473 (1959) (Stewart, J., concurring)).

In the instant case, although we agree that respondent "[did] not surrender his freedom of expression upon becoming an attorney," we conclude that "upon admission to the bar [respondent] incur[red] the obligation to temper his [expression] in the manner allowed by the canons of professional ethics." See *State ex rel. Nebraska State Bar Assn. v. Michaelis*, 210 Neb. at 557, 316 N.W.2d at 53. Accordingly, we conclude there is no merit to respondent's claim that his behavior, if unethical, was protected by his constitutional rights to free speech.

[6] Respondent also claims that he could not have violated DR 7-101(A)(3) because certain of the conduct in which he engaged occurred after Brian had retained new counsel and that thus, the challenged conduct did not occur "during the course of the professional relationship." We disagree. It has been recognized that there is a "distinction between 'professional employment' and 'professional relationship.' A lawyer owes a duty to a

client in the context of a ‘professional relationship’ long after the ‘professional employment’ has terminated.” See *In re Adams*, 293 Or. 727, 737, 652 P.2d 787, 792 (1982) (concluding attorney violated DR 7-101(A)(3) by filing declaratory judgment suit to set aside former client’s workers’ compensation award after client had terminated attorney’s employment). In this connection, we have held that after the professional employment has terminated, an attorney generally has an ongoing obligation to maintain client confidences. See, generally, *State ex rel. Counsel for Dis. v. Lopez Wilson*, 262 Neb. 653, 634 N.W.2d 467 (2001). Furthermore, we have observed that notwithstanding the cessation of the attorney-client employment relationship, an attorney must avoid the present representation of a cause against a client that the attorney formerly represented, and which cause involves a subject matter which is the same as or substantially related to that formerly handled by that attorney. *State ex rel. Wal-Mart v. Kortum*, 251 Neb. 805, 559 N.W.2d 496 (1997). We conclude that respondent’s ethical obligation not to engage in conduct that was prejudicial or damaging to Brian during the course of the professional relationship extended beyond the termination of respondent’s employment relationship with Brian, and respondent’s actions after Brian had secured new counsel can be considered when determining whether respondent violated DR 7-101(A)(3).

Based on our de novo review of the record, see *State ex rel. NSBA v. Gallner*, 263 Neb. 135, 638 N.W.2d 819 (2002), we conclude that the record in the instant case establishes by clear and convincing evidence that respondent engaged in conduct that was prejudicial and damaging to Brian during the course of the professional relationship, in violation of DR 7-101(A)(3). Among other actions, respondent deliberately contacted counsel for the opposing party in an attempt to minimize the amount of the settlement Brian might receive in his workers’ compensation case and contacted the judge scheduled to try Brian’s workers’ compensation claim and impugned Brian’s willingness to tell the truth, all after the attorney-client employment relationship had ceased but while the attorney-client professional relationship was intact. Given this record, we find no merit to respondent’s second assignment of error.

(c) DR 7-105(A)

For his third assignment of error, respondent claims that the referee erred in concluding that respondent engaged in conduct violating DR 7-105(A), which provides, *inter alia*, that a lawyer should not threaten to present criminal charges solely to obtain an advantage in a civil matter. Respondent does not deny that he threatened criminal prosecution against Brian as a result of Brian's response to a request for admissions propounded by respondent. Respondent asserts, however, that "the threat of criminal prosecution in this case was not made *solely* to gain an advantage in a civil proceeding." Brief for respondent at 16.

This argument is without merit. The allegedly perjured statement was made in the course of respondent's attempt to collect the legal fee which he felt was owed to him. Respondent's claim that "his intent was to give [Brian] an opportunity to retract that statement before it was relied upon in the official proceeding" is disingenuous. Brief for respondent at 16. The "official proceeding" referred to by respondent was a proceeding on his claimed attorney fee. In this regard, we note that respondent admitted during the hearing in this case that the purportedly perjured statement, having to do with Brian's assertion that he withdrew respondent's authority to settle the workers' compensation case for \$150,000, had no bearing on respondent's entitlement to an attorney fee. Based on our *de novo* review of the record, see *State ex rel. NSBA v. Gallner*, *supra*, we conclude that the record in the instant case establishes by clear and convincing evidence that respondent threatened to present criminal charges solely to obtain an advantage in a civil matter, in violation of DR 7-105(A).

(d) Violation of Attorney's Oath

Although the referee made no finding in this regard, we conclude that by virtue of respondent's conduct, we find by clear and convincing evidence that in addition to violating DR 1-102(A)(1), (5), and (6); DR 7-101(A)(3); and DR 7-105(A), respondent has violated the attorney's oath of office. See § 7-104.

2. IMPOSITION OF ATTORNEY DISCIPLINE

[7-9] We have stated that the basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the

circumstances. *State ex rel. Counsel for Dis. v. Brinker*, 264 Neb. 478, 648 N.W.2d 302 (2002); *State ex rel. Counsel for Dis. v. Rickabaugh*, 264 Neb. 398, 647 N.W.2d 641 (2002). With respect to the imposition of attorney discipline in an individual case, we have stated that “[e]ach case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case.” *State ex rel. NSBA v. Rothery*, 260 Neb. 762, 766, 619 N.W.2d 590, 593 (2000). We have previously set out the factors which we consider in determining whether and to what extent discipline should be imposed:

To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, we consider the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance and reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the respondent generally, and (6) the respondent’s present or future fitness to continue in the practice of law.

State ex rel. Counsel for Dis. v. Thompson, 264 Neb. 831, 842, 652 N.W.2d 593, 601 (2002).

The evidence in the present case establishes, inter alia, that respondent acted so as to preserve his own interests at the expense of those of Brian. Respondent was verbally abusive to Brian and behaved in a manner which Brian found to be threatening. Respondent contacted opposing counsel and the court in a manner that was likely to be deleterious to his former client’s interests. Respondent also threatened criminal prosecution solely for the purpose of gaining an advantage in a civil matter. Respondent’s behavior demonstrates a disregard for Brian’s interests and for the rules of professional conduct and responsibility.

[10] In assessing the appropriate discipline to be imposed in this case, we note that respondent has been the subject of two prior attorney discipline proceedings. In 1999, respondent was privately reprimanded for sending out advertising brochures to potential clients which contained a false or misleading statement. In 2000, respondent was again privately reprimanded, this time for leaving verbally abusive messages on his clients’ answering machines when the clients indicated some concern with regard to a settlement respondent had negotiated; conduct

which we have noted is similar to certain of respondent's actions in the instant case. We have held that cumulative acts of attorney misconduct are distinguishable from isolated incidents, therefore justifying more serious sanctions. See *State ex rel. NSBA v. Frederiksen*, 262 Neb. 562, 635 N.W.2d 427 (2001).

In the instant case, the referee recommended that respondent be suspended from the practice of law for a period of 1 year. Respondent claims on appeal that such a punishment is excessive. We disagree. To the contrary, we are of the opinion that the referee's recommendation of a 1-year suspension is too lenient and, if applied, would depreciate the seriousness of respondent's actions. See *State ex rel. NSBA v. Gleason*, 248 Neb. 1003, 540 N.W.2d 359 (1995). When we balance the need to protect the public, the nature of respondent's offenses, the need for deterring others, the reputation of the bar as a whole, and respondent's prior disciplinary proceedings against respondent's interest in preserving his privilege to practice law, we must conclude that the only appropriate judgment is to suspend respondent from the practice of law for a period of 2 years, effective immediately.

VI. CONCLUSION

It is the judgment of this court that respondent be suspended from the practice of law for a period of 2 years, effective immediately, after which time respondent may apply for reinstatement. Respondent shall comply with Neb. Ct. R. of Discipline 16 (rev. 2001), and upon failure to do so, respondent shall be subject to punishment for contempt of this court. Accordingly, respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997) and Neb. Ct. R. of Discipline 23(B) (rev. 2001).

JUDGMENT OF SUSPENSION.

STEPHAN, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V.

JOHNNY SEGURA, JR., APPELLANT.

660 N.W.2d 512

Filed May 9, 2003. No. S-02-948.

1. **Convictions: Evidence: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction.
2. **Sentences: Appeal and Error.** Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion.
3. **Criminal Law: Directed Verdict.** In a criminal case, a court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged or the evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained.
4. **Directed Verdict.** If there is any evidence which will sustain a finding for the party against whom a motion for directed verdict is made, the case may not be decided as a matter of law, and a verdict may not be directed.
5. **Sentences: Appeal and Error.** An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result.

Appeal from the District Court for Scotts Bluff County:
RANDALL L. LIPPSTREU, Judge. Affirmed.

Bernard J. Straetker, Scotts Bluff County Public Defender,
for appellant.

Don Stenberg, Attorney General, Marilyn B. Hutchinson, and
Mark Raffety for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, McCORMACK,
and MILLER-LERMAN, JJ.

WRIGHT, J.

NATURE OF CASE

Johnny Segura, Jr., was charged with and convicted of attempted theft and criminal mischief of over \$300. He was sentenced to consecutive terms of 2 months' imprisonment for

attempted theft and 1 year's imprisonment for criminal mischief. Segura appeals the judgments of conviction and sentences.

SCOPE OF REVIEW

[1] Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Johnson*, 261 Neb. 1001, 627 N.W.2d 753 (2001).

[2] Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion. *State v. Canady*, 263 Neb. 552, 641 N.W.2d 43 (2002).

FACTS

On May 16, 2002, Barbara Akin and Lucas Benzeiz were working at a restaurant in a shopping mall in Scottsbluff. Akin and Benzeiz left the restaurant around 9:30 p.m. and walked toward Akin's sport utility vehicle (SUV) in the mall parking lot. As they approached the SUV, they noticed that a door was open and that the dome light was on. Someone was in the front seat looking down at the "control panels" with one leg hanging out of the driver's-side door.

When Akin and Benzeiz were within 10 or 12 feet of the SUV, a man exited the SUV and started walking away. Akin asked, "'What are you doing with my car[?]' " and the man responded, "'Nothing.'" She then asked, "'No, what did you do to my car[?]' " and the man took off running.

Akin observed that the man was about 6 feet tall, had a thin face, and was wearing jeans, a burgundy Nike wind jacket with a white stripe on the sleeve, and a white baseball cap. Benzeiz began chasing the man and told Akin to get into her SUV. Akin immediately called the 911 emergency dispatch service while she

drove toward Benzeiz to pick him up. Benzeiz had run halfway across the parking lot, and he could see that the man was running toward a bank.

Benzeiz saw the man near the bank but then lost sight of him. Akin and Benzeiz drove to the bank parking lot and observed the man running along 20th Street. As they continued their pursuit, Akin and Benzeiz again temporarily lost sight of the man but soon noticed him running across a sidewalk in front of a building called the Loft. They pulled into a nearby parking lot and saw the man run between the Loft and a neighboring Chinese restaurant. The man then ran in the direction of the street as they circled around the buildings.

A police officer arrived, and Akin told the officer that the perpetrator was a Hispanic male wearing a white baseball cap and that he was behind the building. After the officer went around to the back of the building, Akin and Benzeiz saw the man run between the Loft and the restaurant. Two more police officers arrived, and the man, later identified as Segura, was caught and arrested. The entire incident lasted between 5 and 7 minutes.

Akin and Benzeiz testified that Segura was the man they had seen getting out of Akin's SUV and had pursued. They identified him by his clothing and testified that each time they saw him during their pursuit, they knew it was the same man because he was wearing the burgundy jacket and white cap.

The damage to Akin's SUV included a broken triangular window on the rear driver's-side door. A stereo and the console around the stereo were also damaged. It cost Akin \$581.56 to have the damage repaired and the stereo replaced.

Segura was charged with attempted theft, a Class III misdemeanor, and criminal mischief of over \$300, a Class IV felony. At the close of the State's case, Segura moved for a directed verdict, which motion the district court overruled. Segura did not present any evidence. The jury returned verdicts of guilty on both counts and found the pecuniary loss to be \$581.56.

Subsequent to Segura's conviction, but prior to sentencing, criminal mischief causing a pecuniary loss of \$581.56 was reclassified by the Legislature from a Class IV felony to a Class I misdemeanor, and Segura received the benefit of the change for purposes of his sentence. The district court sentenced Segura to

consecutive terms of 2 months' imprisonment for attempted theft and 1 year's imprisonment for criminal mischief. Segura appeals.

ASSIGNMENTS OF ERROR

Segura assigns, restated, that the evidence presented by the State was insufficient to support the convictions and that the district court erred (1) in refusing to sustain his motion for directed verdict and (2) by imposing excessive sentences.

ANALYSIS

SUFFICIENCY OF EVIDENCE AND DIRECTED VERDICT

Segura argues that the evidence presented by the State was insufficient to support his convictions. He asserts that the district court erred in refusing to sustain his motion for directed verdict.

Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Johnson*, 261 Neb. 1001, 627 N.W.2d 753 (2001).

[3,4] In a criminal case, a court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged or the evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained. *State v. Canady*, 263 Neb. 552, 641 N.W.2d 43 (2002). If there is any evidence which will sustain a finding for the party against whom a motion for directed verdict is made, the case may not be decided as a matter of law, and a verdict may not be directed. *Id.*

Segura argues that the evidence presented by the State lacked sufficient probative value to sustain a finding of guilt and was insufficient as a matter of law. He contends that an identification based solely on the clothing he was wearing was insufficient to

establish that he was the perpetrator. He asserts that his convictions should be reversed.

Segura was charged with attempted theft and criminal mischief of over \$300. A person is guilty of theft if he or she “takes, or exercises control over, movable property of another with the intent to deprive him or her thereof,” Neb. Rev. Stat. § 28-511(1) (Reissue 1995), and a person is guilty of criminal attempt if he or she “[i]ntentionally engages in conduct which, under the circumstances as he or she believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his or her commission of the crime,” Neb. Rev. Stat. § 28-201(1)(b) (Cum. Supp. 2002). A person is guilty of criminal mischief if he or she “(a) Damages property of another intentionally or recklessly; or (b) Intentionally tampers with property of another so as to endanger person or property” Neb. Rev. Stat. § 28-519(1) (Cum. Supp. 2002).

Akin and Benzeiz first saw the perpetrator in Akin’s SUV while the dome light was on. They saw him in the front seat of the vehicle and looking down at the “control panels” with his leg hanging out the open driver’s-side door. When the perpetrator got out of the SUV, Akin and Benzeiz were within 10 to 12 feet of him in an illuminated parking lot. Akin testified that when the perpetrator got out of the SUV, she saw that he was about 6 feet tall and had a thin face, and she noticed he was wearing jeans, a burgundy Nike wind jacket with a white stripe on the sleeve, and a white baseball cap.

Benzeiz pursued the man on foot across the parking lot and observed him close to a nearby bank. Although Benzeiz temporarily lost sight of the man while getting into Akin’s SUV, he and Akin spotted the man again when they reached the bank parking lot. Akin testified that from the bank parking lot, she saw the same man running along 20th Street. She testified it was obvious that it was the same man because she could see him running under a street light and he was wearing the same outfit she had seen earlier.

After turning onto 20th Street, Akin and Benzeiz saw the same man running near the front of the Loft building. Akin and Benzeiz circled a neighboring building and saw the same man wearing identical clothing at least two more times before he was finally

arrested by police officers. Segura was the man arrested, and he was wearing clothes matching the descriptions of Akin and Benzeiz. The pursuit and arrest took a total of 5 to 7 minutes. Both Akin and Benzeiz testified that they were certain Segura was the man they saw in the SUV and pursued until his arrest.

Akin testified that after Segura fled, she noticed that the stereo in her SUV was damaged. She also noticed that the console around the stereo had been partially cut away and damaged. Shortly after Segura's arrest, Akin and Benzeiz discovered that the triangular window of the back driver's-side door was broken. The State produced evidence demonstrating the damage totaled \$581.56.

The evidence in the case before us is not so doubtful in character or lacking in probative value that a finding of guilt upon such evidence cannot be sustained. There was sufficient evidence for a jury to find beyond a reasonable doubt that Segura was the perpetrator of the crimes of which he was convicted. Therefore, Segura's assignment of error is without merit.

EXCESSIVE SENTENCES

Segura argues that his sentences, although within statutory limits, were nevertheless excessive and constituted an abuse of discretion by the district court.

Attempted theft is a Class III misdemeanor, which is punishable by a penalty of 0 to 3 months' imprisonment, a \$500 fine, or both. Neb. Rev. Stat. § 28-106 (Cum. Supp. 2002). Segura was sentenced to a term of 2 months' imprisonment for his attempted theft conviction.

At the time Segura committed the offense, criminal mischief causing pecuniary loss in excess of \$300 was a Class IV felony, which is punishable by a maximum of 5 years' imprisonment, a \$10,000 fine, or both. See Neb. Rev. Stat. § 28-105 (Cum. Supp. 2002). Prior to his sentencing, the Legislature reclassified criminal mischief causing pecuniary loss between \$500 and \$1,500 as a Class I misdemeanor, and Segura was given the benefit of the change for purposes of his sentence. See § 28-519. A Class I misdemeanor is punishable by a penalty of 0 to 1 year's imprisonment, a \$1,000 fine, or both. § 28-106. Segura was sentenced to a term of 1 year's imprisonment for his criminal mischief conviction.

[5] Segura's sentences for attempted theft and criminal mischief were both within the statutory limits. Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion. *State v. Canady*, 263 Neb. 552, 641 N.W.2d 43 (2002). An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result. *State v. Faber*, 264 Neb. 198, 647 N.W.2d 67 (2002).

The district court reviewed the presentence investigation report and considered the statutory criteria for determining whether probation or incarceration would be more appropriate. The court also considered a handwritten statement by Segura, which it believed to be untruthful and disingenuous. The court stated that the letter was "counterproductive to any type of sentence of probation and would render a sentence of probation somewhat meaningless," considering the weight of the evidence in the case and the short time it took the jury to reach a unanimous decision.

The district court stated that it considered Segura's prior record in determining his sentence. The court noted two 1998 convictions in which Segura was given concurrent 90-day sentences. It explained that Segura was granted leniency in 1998 for similar crimes and that he did not take advantage of that leniency. It noted that part of the purpose of the 1998 sentences was to give Segura a warning and an opportunity to show that he could change his ways, but Segura had failed to do so.

Segura's sentences do not demonstrate that the district court abused its discretion. Therefore, Segura's assignment of error that the court abused its discretion by imposing excessive sentences has no merit.

CONCLUSION

Finding no merit to Segura's assignments of error, we affirm the judgments of conviction and sentences of the district court.

AFFIRMED.

STEPHAN, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V.
PAUL E. MARCUS, APPELLANT.
660 N.W.2d 837

Filed May 9, 2003. No. S-02-997.

1. **Search Warrants: Affidavits: Probable Cause: Appeal and Error.** When the underlying circumstances are detailed in the affidavit, reason for crediting the source of the information is given, and when a magistrate has found probable cause, the duty of a court reviewing the issuance of a warrant is to ensure that the magistrate had a substantial basis for concluding that probable cause existed.
2. **Criminal Law: Identification Procedures: Probable Cause.** The identifying physical characteristics statutes, Neb. Rev. Stat. §§ 29-3301 to 29-3307 (Reissue 1995), require a showing of probable cause to believe the person seized has engaged in an articulable criminal offense before the judicial officer can issue an order to produce identifying physical characteristics.
3. **Identification Procedures: Probable Cause: Appeal and Error.** When determining whether an order to produce identifying physical characteristics was based on a showing of probable cause, an appellate court considers the totality of the circumstances.
4. **Search Warrants: Probable Cause.** Under the totality of the circumstances standard, the magistrate who is evaluating the probable cause question must make a practical, commonsense decision.
5. **Search Warrants: Affidavits: Appeal and Error.** An appellate court's after-the-fact scrutiny of the sufficiency of an affidavit should not take the form of a de novo review.
6. **Search Warrants: Probable Cause: Appeal and Error.** A magistrate's determination of probable cause should be paid great deference by reviewing courts.
7. **Search Warrants: Affidavits.** When a search warrant is obtained on the strength of information from an informant, the affidavit in support of issuance of the warrant must set forth facts demonstrating the basis of the informant's knowledge of criminal activity, and the affiant must establish the informant's credibility or the informant's credibility must be established in the affidavit through a police officer's independent investigation.
8. ____: _____. The reliability of an informant may be established by showing in the affidavit to obtain a search warrant that (1) the informant has given reliable information to police officers in the past, (2) the informant is a citizen informant, (3) the informant has made a statement that is against his or her penal interest, or (4) a police officer's independent investigation establishes the informant's reliability or the reliability of the information the informant has given.
9. ____: _____. The status of a citizen informant cannot attach unless the affidavit used to obtain a search warrant affirmatively sets forth circumstances from which the informant's status as a citizen informant can reasonably be inferred.
10. **Criminal Law: Eyewitnesses: Words and Phrases.** A citizen informant is a citizen who purports to have been the witness to a crime who is motivated by good citizenship and acts openly in aid of law enforcement.
11. **Eyewitnesses.** Once an individual is considered to be a citizen informant, reliability still must be shown, but it may appear by the very nature of the circumstances under which the incriminating information became known.

12. **Criminal Law: Eyewitnesses.** An informant's detailed eyewitness report of a crime may be self-corroborating because it supplies its own indicia of reliability.
13. **Criminal Law: Eyewitnesses: Presumptions.** An untested citizen informant who has personally observed the commission of a crime is presumptively reliable.
14. **Eyewitnesses: Police Officers and Sheriffs.** When a citizen informant's information is based on another person's statements, law enforcement officers are required to make further inquiry about the underlying facts and circumstances on which the report is based.

Appeal from the District Court for Lancaster County, BERNARD J. MCGINN, Judge, on appeal thereto from the County Court for Lancaster County, LAURIE J. YARDLEY and GALE POKORNY, Judges. Judgment of District Court affirmed.

Franklin Elliott Miner for appellant.

Don Stenberg, Attorney General, and Kimberly A. Klein for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

Paul E. Marcus appeals the overruling of a motion to suppress photographs that were authorized by an order to produce identifying physical characteristics. He contends that the affidavit for the order lacked probable cause because law enforcement officers failed to show that an informant's information was based on personal knowledge. He also argues that the order does not comply with Neb. Rev. Stat. § 29-3305 (Reissue 1995). We determine that the informant was a citizen informant whose information was sufficiently corroborated and that the order complied with § 29-3305. Accordingly, we affirm.

BACKGROUND

On August 27, 2001, Jodie Carlton, a salesclerk for Goodwill, observed a man entering the store. The man was described as a darker skinned male, possibly East Indian, 35 to 40 years of age, 5 feet 8 inches tall, medium build, wearing a black T-shirt with white lettering and dark blue gym shorts. He walked to the counter and asked where the gym shorts were. He later returned

wearing a pair of yellow shorts and asked Carlton if the shorts were too tight. Carlton observed that he was fondling his genitals outside of the shorts. He then walked around the counter to the entry area and asked Carlton to check the size of the shorts. While standing in front of Carlton, he asked Carlton to see if there was a tag inside the shorts, pulled the back and front of the shorts down, and exposed his penis. He then returned to the dressing room and left after changing clothes. Carlton told the police that she believed she could identify the man from a photographic lineup.

Two days later, Dina Hopper, an employee of the Nebraska Game and Parks Commission, called Sgt. Joseph Wright of the Lincoln Police Department after reading an article about the offense in the Lincoln Journal Star newspaper. Hopper told Wright that Marcus matched the suspect description. She stated that Marcus was a problem at area lakes because he would often contact young women, ask if his shorts or swimsuit was too small, and then expose himself.

The police did not have a photograph of Marcus in their imaging system. Wright contacted Marcus and, according to his police report, asked Marcus if he was in the area of the Goodwill store on "Monday, 08-28." This appears to be a typographical error because the incident occurred on Monday, August 27, 2001. Marcus stated that he may have been in the area of the Goodwill store at the time of the incident, but that he did not go inside the store. He refused to have his photograph taken.

Wright prepared an affidavit repeating the information obtained from Carlton, Hopper, and Marcus. The affidavit also contains the same reference to "Monday, August 28, 2001," as in the police report. Wright stated in the affidavit that the procurement of photographs of Marcus was necessary to determine whether he was the individual responsible for the crime.

The county court entered an order to produce physical identifying characteristics. One provision of the order authorized the Lincoln Police Department to obtain the evidence at the police department or "where ever deemed most practical by officers of the Lincoln Police Department." Another provision stated that Marcus "shall appear at the Lincoln Police Department . . . at such date and time as is designated by Sergeant Joseph Wright

for the purpose of obtaining the above-mentioned physical characteristic evidence.”

Marcus was later contacted at his residence, and photographs were obtained. Carlton identified Marcus in a photographic lineup, and he was arrested. Marcus’ motion to suppress the photographs was overruled. The county court concluded that the affidavit established probable cause because Hopper identified Marcus as meeting the description of the perpetrator, Marcus was identified as using the same language in making contact with other victims, and Marcus had placed himself in the area of the crime at the time it was committed. Marcus was convicted of indecent exposure and was fined \$500. The district court affirmed, concluding that there was probable cause and that the order met the requirements of § 29-3305. Marcus appeals.

ASSIGNMENTS OF ERROR

Marcus assigns that the county court erred in overruling his motion to suppress and finding him guilty and that the district court erred in affirming the county court’s decision.

STANDARD OF REVIEW

[1] When the underlying circumstances are detailed in the affidavit, reason for crediting the source of the information is given, and when a magistrate has found probable cause, the duty of a court reviewing the issuance of a warrant is to ensure that the magistrate had a substantial basis for concluding that probable cause existed. See *State v. Duff*, 226 Neb. 567, 412 N.W.2d 843 (1987).

ANALYSIS

Marcus contends that the affidavit was insufficient to show probable cause because it does not establish Hopper’s credibility or the accuracy of her statements.

[2-6] The identifying physical characteristics statutes, Neb. Rev. Stat. §§ 29-3301 to 29-3307 (Reissue 1995), require a showing of probable cause to believe the person seized has engaged in an articulable criminal offense before the judicial officer can issue an order to produce identifying physical characteristics. *State v. Evans*, 215 Neb. 433, 338 N.W.2d 788 (1983). When determining whether an order to produce identifying physical characteristics

was based on a showing of probable cause, we consider the totality of the circumstances. *Id.* See *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). Under this standard, the magistrate who is evaluating the probable cause question must make a practical, commonsense decision. *State v. Faber*, 264 Neb. 198, 647 N.W.2d 67 (2002). An appellate court's after-the-fact scrutiny of the sufficiency of an affidavit should not take the form of a de novo review. *Id.* A magistrate's determination of probable cause should be paid great deference by reviewing courts. *Id.*

[7,8] In the context of a search warrant, we have said that when the warrant is obtained on the strength of information from an informant, the affidavit in support of issuance of the warrant must set forth facts demonstrating the basis of the informant's knowledge of criminal activity. *State v. Faber, supra*. Further, the affiant must establish the informant's credibility or the informant's credibility must be established in the affidavit through a police officer's independent investigation. *Id.* The reliability of an informant may be established by showing in the affidavit to obtain a search warrant that (1) the informant has given reliable information to police officers in the past, (2) the informant is a citizen informant, (3) the informant has made a statement that is against his or her penal interest, or (4) a police officer's independent investigation establishes the informant's reliability or the reliability of the information the informant has given. *Id.*

Here, nothing in the affidavit indicates that Hopper gave reliable information to the police in the past or made a statement against penal interest. Therefore, the first question is whether Hopper is a citizen informant.

[9,10] The status of a citizen informant cannot attach unless the affidavit used to obtain a search warrant affirmatively sets forth circumstances from which the informant's status as a citizen informant can reasonably be inferred. *State v. Peters*, 261 Neb. 416, 622 N.W.2d 918 (2001). When considering the sufficiency of probable cause based on information supplied by an informant, it is important to distinguish the police tipster—who acts for money, leniency, or some other selfish purpose—from the citizen informer, whose only motive is to help law officers in the suppression of crime. *State v. Lytle*, 255 Neb. 738, 587 N.W.2d 665 (1998), *disapproved in part on other grounds, State v. Johnson*,

256 Neb. 133, 589 N.W.2d 108 (1999). Unlike the professional informant, the citizen informant is without motive to exaggerate, falsify, or distort the facts to serve his or her own ends. *Id.* A citizen informant is a citizen who purports to have been the witness to a crime who is motivated by good citizenship and acts openly in aid of law enforcement. *Id.*

Here, Hopper was a citizen informant. She acted openly to assist law enforcement, and nothing in the record suggests that she had a motive to exaggerate, falsify, or distort the facts to serve her own ends. Instead, it is reasonable to infer that she was motivated by good citizenship.

Although Hopper was a citizen informant, the affidavit did not present her as a direct witness to the incidents that she reported to the police. As a result, the affidavit failed to show that Hopper's information was based on personal knowledge. We conclude that this factor does not change Hopper's status as a citizen informant. Instead, the question is the extent to which law enforcement must independently investigate the information provided by Hopper in the absence of evidence that Hopper had personal knowledge of the reported events.

[11-14] Once an individual is considered to be a citizen informant, reliability still must be shown, but it may appear by the very nature of the circumstances under which the incriminating information became known. *State v. Duff*, 226 Neb. 567, 412 N.W.2d 843 (1987). Thus, we have said that an informant's detailed eyewitness report of a crime may be self-corroborating because it supplies its own indicia of reliability. *Id.* We have also said that an untested citizen informant who has personally observed the commission of a crime is presumptively reliable. *State v. Detweiler*, 249 Neb. 485, 544 N.W.2d 83 (1996); *State v. Duff*, *supra*. But when a citizen informant's information is based on another person's statements, courts have concluded that law enforcement officers are required to make further inquiry about the underlying facts and circumstances on which the report is based. This reduces the possibility of mistake and satisfies the minimum standards for establishing probable cause. See, e.g., *State v. Williamson*, 290 Mont. 321, 965 P.2d 231 (1998).

Here, when the affidavit does not establish that Hopper's information was based on personal knowledge, her information is not

entitled to the presumption of reliability. But law enforcement officers also corroborated some of the information provided by Hopper and Carlton. Law enforcement officers visited with Marcus and observed that he met the physical description of the suspect. This corroborated Hopper's statement that Marcus fit the description that she read about in the newspaper. Law enforcement officers were also able to observe that Marcus met the description given by Carlton. Marcus was then asked if he had been in the area of the Goodwill store on the date of the offense, and he answered affirmatively.

We consider whether, under the totality of the circumstances, the issuing magistrate had a substantial basis on which to find probable cause. We conclude that the ability of law enforcement officers to confirm that Marcus met the description of the suspect as given by Carlton, along with Marcus' statement that he had been in the area of the Goodwill store on the date of the crime, established a substantial basis on which the magistrate could find probable cause to issue the order. Thus, we determine that the court was correct when it determined that the affidavit was valid and denied the motion to suppress.

Marcus next contends that the order does not comply with § 29-3305, because the order was vague or overbroad concerning where and when the photographs could be taken.

Section 29-3305 provides:

Any order issued under sections 29-3301 to 29-3307 shall specify (1) the character of the alleged criminal offense which is the subject of the application; (2) the specific type or types of identifying physical characteristic evidence which are sought; (3) the identity or description of the individual who may be detained for obtaining such evidence; (4) the name and official status of the peace officer or officers authorized to obtain such evidence and to effectuate any detention which may be necessary to obtain the evidence; (5) the place at which the obtaining of such evidence may be carried out; (6) that the person will be under no legal obligation to submit to any interrogation or to make any statement during the period of his appearance except that required for voice identification; (7) that the individual shall forthwith accompany the officer serving the order for the

purpose of carrying out its objectives, or, in the alternative, fixing a time at which the individual shall appear for the purpose of carrying out the objectives of the order

The order authorized the Lincoln Police Department to obtain the evidence at the police department or “where ever deemed most practical by officers of the Lincoln Police Department.” Although lacking in specific detail, we conclude this statement meets § 29-3305(5), which requires the order to state the place at which the obtaining of physical evidence may be carried out.

The order also stated that Marcus “shall appear at the Lincoln Police Department . . . at such date and time as is designated by Sergeant Joseph Wright for the purpose of obtaining the above-mentioned physical characteristic evidence.” Marcus argues that this statement is inconsistent with the provision of the order allowing the evidence to be obtained wherever was deemed most practical. But this statement is also specifically required by § 29-3305(7), which requires the order to state that the individual shall accompany the officer serving the order or shall fix a date and time at which the individual shall appear for purposes of carrying out the order.

Marcus also argues that the ability of law enforcement officers to take his photograph in front of his home created an embarrassing situation. The record indicates that law enforcement officers took the photograph at Marcus’ residence to save him the trouble of coming to the station. Further, our concern on appeal is whether the order complied with § 29-3305. We conclude that the order contained the information required by § 29-3305 and that the court correctly overruled the motion to suppress.

AFFIRMED.

COLIN M. GOURLEY, A MINOR, BY AND THROUGH
MICHAEL J. GOURLEY, HIS FATHER, AND LISA A. GOURLEY,
HIS MOTHER, AS NEXT FRIENDS AND NATURAL GUARDIANS, ET AL.,
APPELLEES, V. NEBRASKA METHODIST HEALTH SYSTEM, INC.,
A CORPORATION, APPELLEE, AND MICHELLE S. KNOLLA, M.D.,
AND OBSTETRICIANS-GYNECOLOGISTS, P.C., DOING
BUSINESS AS THE OB/GYN GROUP, APPELLANTS.

663 N.W.2d 43

Filed May 16, 2003. No. S-00-679.

1. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
3. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, on which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
4. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below.
5. **Statutes: Appeal and Error.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
6. **Juries.** The “any majority” rule applies to Neb. Rev. Stat. § 25-1125 (Reissue 1995); a juror is free to deliberate and vote on each issue presented to the jury, even if the juror has dissented from the majority on a previous issue.
7. **Expert Witnesses.** An expert’s opinion need not be expressed with reasonable certainty within the expert’s field of expertise, but may be expressed with reasonable probability.
8. _____. An expert’s opinion must be sufficiently definite and relevant to provide a basis for the fact finder’s determination of an issue or question.
9. _____. Expert testimony should not be received if it appears the witness is not in possession of such facts as will enable him or her to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture.
10. _____. When an expert’s opinion is mere speculation or conjecture, it is irrelevant.
11. **Trial: Expert Witnesses.** Whether an expert’s opinion is too speculative to be admitted is a question for the trial court’s discretion.
12. **New Trial: Appeal and Error.** Only an error which is prejudicial to the rights of the unsuccessful party justifies a new trial.

13. **Verdicts: Appeal and Error.** In the absence of prejudicial error, the successful party, having sustained the burden and expense of trial, may keep the benefit of the verdict.
14. **Trial: Evidence: Appeal and Error.** In a civil case, the admission or exclusion of evidence which unfairly prejudices a substantial right of the complaining litigant constitutes reversible error.
15. **Jury Trials: Evidence: Appeal and Error.** When it appears from the record that evidence wrongfully admitted in a jury trial did not affect the result of the trial unfavorably to the party against whom it was admitted, its reception is not prejudicial error.
16. **Trial: Evidence: Appeal and Error.** One may not on appeal assert a different ground for excluding evidence than was urged in the objection made to the trial court.
17. **Trial: Appeal and Error.** If a defendant does not offer an objection and does not expressly adopt a codefendant's objection, the matter is not preserved for him or her on appeal.
18. **Rules of Evidence: Hearsay: Proof.** Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.
19. ____: ____: _____. Out-of-court statements, if not offered for the purpose of proving the truth of the facts asserted, are not hearsay.
20. **Constitutional Law: Courts: Statutes.** When specific constitutional questions are presented, courts will not search for constitutional authority that was not raised and argued by the parties to overthrow a legislative enactment.
21. **Constitutional Law: Statutes: Special Legislation.** The focus of the prohibition against special legislation is the prevention of legislation which arbitrarily benefits or grants "special favors" to a specific class.
22. ____: ____: _____. A legislative act constitutes special legislation if (1) it creates an arbitrary and unreasonable method of classification or (2) it creates a permanently closed class.
23. **Constitutional Law: Special Legislation: Public Policy.** A legislative classification, in order to be valid, must be based upon some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation with respect to objects to be classified.
24. **Special Legislation.** Classifications for the purpose of legislation must be real and not illusive; they cannot be based on distinctions without a substantial difference.
25. **Constitutional Law: Special Legislation.** Classification for the purpose of legislation is proper if the special class has some reasonable distinction from other subjects of a like general character, which distinction bears some reasonable relation to the legitimate objectives and purposes of the legislation.
26. **Constitutional Law: Statutes: Presumptions.** Statutes are afforded a presumption of constitutionality, and the unconstitutionality of a statute must be clearly established before it will be declared void.
27. **Constitutional Law: Legislature: Presumptions.** The Nebraska Legislature is presumed to have acted within its constitutional power despite that, in practice, its laws may result in some inequality.
28. **Statutes: Courts: Legislature: Intent.** Courts will not reexamine independently the factual basis on which the Legislature justified a statute, nor will a court independently review the wisdom of the statute.

29. **Statutes: Courts: Appeal and Error.** An appellate court does not sit as a superlegislature to review the wisdom of legislative acts.
30. **Constitutional Law: Statutes: Legislature: Intent.** All reasonable intendments must be indulged to support the constitutionality of legislative acts, including classifications adopted by the Legislature.
31. **Special Legislation: Legislature: Public Policy.** If the Legislature had any evidence to justify its reasons for passing an act, then it is not special legislation if the class is based upon some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation concerning the objects to be classified.
32. **Special Legislation: Legislature: Intent.** The determination whether an act of the Legislature is special legislation is reached by considering what the Legislature could have found at the time the act was passed.
33. **Statutes: Legislature: Courts.** It is up to the Legislature and not a court to decide whether its legislation continues to meet the purposes for which it was originally enacted.
34. **Special Legislation: Statutes.** The cap on damages in Neb. Rev. Stat. § 44-2825(1) (Reissue 1998) does not violate principles prohibiting special legislation.
35. **Equal Protection: Statutes: Proof.** The party attacking a statute as violative of equal protection has the burden to prove that the classification violates the Equal Protection Clause.
36. **Equal Protection.** The Equal Protection Clause does not forbid classifications; it simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike.
37. _____. In any equal protection challenge to a statute, the degree of judicial scrutiny to which the statute is to be subjected may be dispositive.
38. **Constitutional Law: Statutes.** If a legislative classification involves either a suspect class or a fundamental right, courts will analyze the statute with strict scrutiny.
39. **Constitutional Law: Statutes: Legislature: Intent.** Under the strict scrutiny test, strict accordance must exist between the classification and the statute's purpose. The result the Legislature seeks to effectuate must be a compelling state interest, and the means employed in the statute must be such that no less restrictive alternative exists.
40. _____. _____. _____. _____. If a statute involves economic or social legislation not implicating a fundamental right or suspect class, courts will ask only whether a rational relationship exists between a legitimate state interest and the statutory means selected by the Legislature to accomplish that end. Upon a showing that such a rational relationship exists, courts will uphold the legislation.
41. **Constitutional Law: Statutes: Appeal and Error.** Some legislative classifications, such as those based on gender, are reviewed under an intermediate level of scrutiny.
42. **Constitutional Law: Damages.** The rational basis test is applied to review the damages cap in Neb. Rev. Stat. § 44-2825(1) (Reissue 1998).
43. **Equal Protection.** Under the rational basis test, the Equal Protection Clause is satisfied as long as there is (1) a plausible policy reason for the classification, (2) the legislative facts on which the classification is apparently based may rationally have been considered to be true by the governmental decisionmaker, and (3) the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.

44. _____. The rational relationship standard is the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause.
45. **Constitutional Law: Statutes.** When determining whether a rational basis exists for a legislative classification, courts look to see if any state of facts can be conceived to reasonably justify the disparate treatment which results.
46. **Equal Protection: Statutes.** In economics and social welfare, a statute does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.
47. **Constitutional Law: Statutes.** The fact that other legislative classification schemes could have been selected does not mean that the scheme chosen is constitutionally infirm.
48. **Constitutional Law: Courts: Legislature: Statutes.** As long as the classification scheme chosen by the Legislature rationally advances a reasonable and identifiable governmental objective, a court must disregard the existence of other methods that other individuals might have preferred.
49. **Equal Protection: Courts: Legislature: Intent.** Social and economic measures run afoul of the Equal Protection Clause only when the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that a court can only conclude that the Legislature's actions were irrational.
50. **Equal Protection: Statutes: Damages.** The cap on damages in Neb. Rev. Stat. § 44-2825 (Reissue 1998) satisfies principles of equal protection.
51. **Legislature.** The Legislature is free to create and abolish rights so long as no vested right is disturbed.
52. **Constitutional Law.** No one has a vested interest in any rule of the common law or a vested right in any particular remedy.
53. _____. If a common-law right is taken away, nothing need be given in return.
54. **Constitutional Law: Statutes: Damages.** The cap on damages in Neb. Rev. Stat. § 44-2825(1) (Reissue 1998) does not violate Neb. Const. art. I, § 13.
55. **Constitutional Law: Jury Trials.** The purpose of Neb. Const. art. I, § 6, is to preserve the right to a jury trial as it existed at common law and under the statutes in force when the constitution was adopted.
56. **Actions: Juries.** The remedy available in an action is a question of law, not fact, and is not a matter to be decided by the jury.
57. **Constitutional Law: Statutes: Damages: Jury Trials.** The cap on damages in Neb. Rev. Stat. § 44-2825 (Reissue 1998) does not violate the right to a jury trial.
58. **Constitutional Law: Statutes: Damages: Property.** The cap on damages in Neb. Rev. Stat. § 44-2825 (Reissue 1998) does not violate Neb. Const. art. I, § 21.
59. **Constitutional Law: Statutes: Damages: Remittitur.** The cap on damages in Neb. Rev. Stat. § 44-2825 (Reissue 1998) does not act as a legislative remittitur or otherwise violate principles of separation of powers.
60. **Rules of the Supreme Court: Appeal and Error.** A cross-appeal must be properly designated under Neb. Ct. R. of Prac. 9D(4) (rev. 2000) if affirmative relief is to be obtained.

Appeal from the District Court for Douglas County: MICHAEL MCGILL, Judge. Affirmed in part, and in part reversed.

William M. Lamson, Jr., Raymond E. Walden, and William R. Settles, of Lamson, Dugan & Murray, L.L.P., and John R. Klein for appellants.

Daniel B. Cullan and Paul W. Madgett, of Cullan & Cullan, and John Vail for appellees Colin M. Gourley et al.

James A. Snowden and Andrew B. Koszewski, of Wolfe, Snowden, Hurd, Luers & Ahl, for appellee Andrew Robertson, M.D.

Thomas J. Shomaker and Mary M. Schott, of Sodoro, Daly & Sodoro, for appellee Nebraska Methodist Health System, Inc.

Charles M. Pallesen, Jr., of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for amici curiae Nebraska Medical Association and Greater Nebraska Medical Coalition.

William F. Austin, of Erickson & Sederstrom, P.C., for amici curiae Nebraska Association of Hospitals and Health Systems and Cherry County Hospital.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, and McCORMACK, JJ., and HANNON and CARLSON, Judges.

PER CURIAM.

Neb. Rev. Stat. § 44-2825(1) (Reissue 1998) of the Nebraska Hospital-Medical Liability Act limits recoverable damages in medical malpractice actions to \$1,250,000. The district court determined that the damages limitation was unconstitutional because it denied the appellees Colin M. Gourley and his parents, Michael J. Gourley and Lisa A. Gourley, equal protection of the law and a right to a jury trial. The appellants, Michelle S. Knolla, M.D., and Obstetricians-Gynecologists, P.C., doing business as the OB/GYN Group, contend that (1) the district court erred in determining that § 44-2825(1) was unconstitutional, (2) the jury verdict was invalid, and (3) the court erred in admitting hearsay and irrelevant evidence.

I. NATURE OF CASE

The Gourleys brought this medical malpractice action against Nebraska Methodist Health System, Inc., and Nebraska Methodist

Hospital (collectively Methodist Hospital); Knolla; Marvin L. Dietrich, M.D.; Andrew Robertson, M.D.; Pauline R. Sleder, M.D.; OB/GYN Group; and Perinatal Associates, P.C. The Gourleys sought damages for injuries sustained by Colin because of the alleged negligent care Lisa received during her pregnancy. A jury awarded the Gourleys \$5,625,000, and the district court entered judgment for the Gourleys in that amount and against Knolla and the OB/GYN Group.

II. BACKGROUND

During her pregnancy, Lisa received prenatal care from Knolla, an obstetrician and gynecologist employed with the OB/GYN Group. On November 15, 1993, in the 36th week of her pregnancy, Lisa informed Knolla that she noticed less movement from the twin fetuses she was carrying. Knolla assured Lisa that this was common and that everything appeared to be normal. Two days later, Lisa called the OB/GYN Group to again report a lack of fetal movement and was told to come to the office to meet with Dietrich. Dietrich's examination revealed that one of the fetuses suffered from bradycardia, a decrease in the fetus' heart rate, and a lack of amniotic fluid. Dietrich instructed Lisa to proceed to Methodist Hospital for examination by Robertson, who was employed by Perinatal Associates.

During his examination, Robertson determined that an immediate cesarean section should be performed. Shortly thereafter, Colin and his twin brother, Connor, were delivered. Colin was born with brain damage and currently suffers from cerebral palsy and significant physical, cognitive, and behavioral difficulties.

The Gourleys filed suit alleging that Knolla and the OB/GYN Group failed to monitor Lisa and Colin while they were under their care. At the close of the Gourleys' case in chief, Methodist Hospital moved for a directed verdict. The court granted the motion and dismissed Methodist Hospital.

The jury found Knolla and the OB/GYN Group to be 60 percent and 40 percent negligent, respectively. The jury awarded the Gourleys \$5,625,000. The Gourleys moved for a new trial, arguing that the court erred in granting a directed verdict to Methodist Hospital. The jury found for Dietrich, Robertson,

Sleder, and Perinatal Associates, and the court later dismissed them from the case.

The district court reduced the jury's award and entered judgment for the Gourleys and against Knolla and the OB/GYN Group, jointly and severally, in the amount of \$1,250,000. The court found that § 44-2825(1) was constitutional.

The Gourleys filed a second motion for new trial, contending that the cap on damages imposed by § 44-2825 is unconstitutional because it violates their rights to (1) equal protection; (2) a jury trial; (3) an open court and full remedy; (4) substantive due process; and (5) life, liberty, and the pursuit of happiness. The Gourleys also alleged that the Legislature exceeded its power when imposing the cap and that the cap was unconstitutional special legislation.

Knolla and the OB/GYN Group also moved for a new trial because of 16 alleged errors, among which were that the verdict was not agreed to by five-sixths of the jury as required by Neb. Rev. Stat. § 25-1125 (Reissue 1995) and that the court erred in receiving certain exhibits and testimony into evidence.

The court (1) overruled the Gourleys' motion for new trial on Methodist Hospital's directed verdict and (2) overruled Knolla and the OB/GYN Group's motion for new trial, specifically rejecting their argument that the jury verdict was invalid. Knolla and the OB/GYN Group's other grounds for new trial were also overruled without explanation.

The court reversed its decision and concluded that the cap on damages in § 44-2825(1) violated equal protection under Neb. Const. art. I, § 3. The court also concluded that § 44-2825(1) violated the Gourleys' right to a jury trial under Neb. Const. art. I, § 6. The court found that § 44-2825(1) was severable from the rest of the act. The court vacated its previous order and entered judgment for the Gourleys and against Knolla and the OB/GYN Group, jointly and severally, in the full amount of \$5,625,000. Knolla and the OB/GYN Group appeal.

III. ASSIGNMENTS OF ERROR

Knolla and the OB/GYN Group assign that the district court erred in (1) denying their motion for new trial when the jury returned an invalid verdict; (2) admitting unsupported and hearsay

evidence in the form of a “Life Care Plan for Colin Gourley” by Terry Winkler, M.D.; (3) admitting a book, “What To Expect When You’re Expecting,” into evidence which contained hearsay, was itself hearsay, and was likely to confuse the jury; (4) overruling their motion for new trial; (5) declaring unconstitutional the damages cap of the Nebraska Hospital-Medical Liability Act, § 44-2825, and in reversing its order reducing the amount of the judgment to the statutory maximum of \$1,250,000; and (6) applying its ruling on the constitutionality of the act retrospectively.

The Gourleys purported to file a cross-appeal, assigning that the court erred in granting Methodist Hospital’s motion for directed verdict.

IV. STANDARD OF REVIEW

[1,2] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. *Green Tree Fin. Servicing v. Sutton*, 264 Neb. 533, 650 N.W.2d 228 (2002). A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Gallner v. Hoffman*, 264 Neb. 995, 653 N.W.2d 838 (2002).

[3] Statutory interpretation presents a question of law, on which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Newman v. Thomas*, 264 Neb. 801, 652 N.W.2d 565 (2002).

[4] Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below. *Hass v. Neth*, ante p. 321, 657 N.W.2d 11 (2003).

V. ANALYSIS

1. JURY VERDICT

Knolla and the OB/GYN Group argue that they are entitled to a new trial because the verdict was not agreed to by five-sixths of the jury as required by § 25-1125.

Section 25-1125 provides that “[i]n all trials in civil actions in any court in this state, a verdict shall be rendered if five-sixths or more of the members of the jury concur therein, and such verdict shall have the same force and effect as though agreed to by all members of the jury” Here, the jury signed and returned two verdict forms. We construe verdict form No. 2 as requiring the jury to determine which defendants were liable and verdict form No. 1 as requiring the jury to decide the amount of damages and how to apportion the defendants’ negligence. Although 10 jurors signed both verdict forms, the forms were not signed by the same 10 jurors. This means that a juror who disagreed with the determination of who was liable provided the 10th vote necessary to decide the amount of damages and how to apportion the defendants’ negligence. Thus, we must decide if a verdict is valid under § 25-1125 if the same five-sixths of the jury fails to agree on each essential issue embodied in that verdict.

[5] In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Newman v. Thomas, supra*. Nothing in the plain language of § 25-1125 indicates whether the same five-sixths of a jury must agree on each essential issue embodied in its verdict. Several jurisdictions, however, have addressed the issue within the context of similar statutory and constitutional provisions, and we turn to these cases for guidance in construing § 25-1125.

Other jurisdictions have answered the question in one of two ways. See David A. Lombardero, *Do Special Verdicts Improve the Structure of Jury Decision-Making?*, 36 *Jurimetrics J.* 275 (1996). One group has adopted the “same juror” rule. See, e.g., *Stacy v. Truman Medical Center*, 836 S.W.2d 911 (Mo. 1992); *O’Connell v. Chesapeake & Ohio RR.*, 58 Ohio St. 3d 226, 569 N.E.2d 889 (1991); *Klanseck v. Anderson Sales*, 136 Mich. App. 75, 356 N.W.2d 275 (1984); *Ferguson v. Northern States Power Co.*, 307 Minn. 26, 239 N.W.2d 190 (1976); *Clark v. Strain et al*, 212 Or. 357, 319 P.2d 940 (1958); *Fleischhacker v. State Farm Mut. Automobile Ins. Co.*, 274 Wis. 215, 79 N.W.2d 817 (1956). Under this rule, the same fractional group of jurors must concur on each issue necessary to support the ultimate verdict. See H. William

Walker, Jr., Comment, *Vote Distribution in Non-Unanimous Jury Verdicts*, 27 Wash. & Lee L. Rev. 360 (1970). If we adopt the same juror rule, the verdict would be invalid because the 10 jurors who determined which defendants were liable were not the same 10 jurors who apportioned the defendants' negligence and determined the amount of damages.

Other courts have rejected the "same juror" rule in favor of the "any majority" rule. See, e.g., *Hendrix v. Docusort, Inc.*, 18 Kan. App. 2d 806, 860 P.2d 62 (1993); *Young v. J.B. Hunt Transp., Inc.*, 781 S.W.2d 503 (Ky. 1989); *Williams v. James*, 113 N.J. 619, 552 A.2d 153 (1989); *Schabe v Hampton Bays*, 103 A.D.2d 418, 480 N.Y.S.2d 328 (1984); *Jaurez v. Superior Court of Los Angeles Cty.*, 31 Cal. 3d 759, 647 P.2d 128, 183 Cal. Rptr. 852 (1982); *Tillman v. Thomas*, 99 Idaho 569, 585 P.2d 1280 (1978); *McChristian v. Hooten*, 245 Ark. 1045, 436 S.W.2d 844 (1969); *Ward v. Weekes*, 107 N.J. Super. 351, 258 A.2d 379 (1969). Under this rule, all jurors are free to deliberate and vote on every issue "regardless of their votes on other issues. . . . Plaintiff prevails if the specified number of jurors find in her favor on each element." Lombardero, *supra*, at 298. If we adopt the any majority rule, the verdict would be valid, because at least 10 jurors found for the Gourleys on each element necessary to support a verdict in their favor.

Although there are persuasive arguments for both rules, we conclude that the "any majority" rule better serves the purposes underlying § 25-1125. See *Volquardson v. Hartford Ins. Co.*, 264 Neb. 337, 352, 647 N.W.2d 599, 611 (2002) ("[w]hen construing a statute, an appellate court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it").

The movement to abolish the unanimous verdict requirement was meant to improve judicial efficiency while preserving fundamental fairness in the jury system. As one court has explained: "Nonunanimous verdicts decrease the number of mistrials and retrials and thus reduce court congestion, delay and the cost of maintaining the judicial system. They also reduce the number of unjust verdicts deriving from juror obstinacy or dishonesty and discourage compromise verdicts." *Schabe v Hampton Bays*,

103 A.D.2d at 423, 480 N.Y.S.2d at 333. See, also, *Ward v. Weekes*, *supra*.

Courts have recognized that the “mechanistic” same juror rule does less to improve judicial efficiency than the any majority rule. *Tillman v. Thomas*, *supra*. Under the same juror rule, the same fractional group of jurors must agree on each issue necessary to support the ultimate verdict. For example, in a typical personal injury case, only the jurors in the five-sixths majority that agreed that a defendant was negligent could vote on the question of damages. The votes of any jurors who dissented on the negligence question could not be used to reach a five-sixths majority on the damages question. As a result, if the 10 jurors who agreed on the negligence question could not agree on the question of damages, the result would be a hung jury.

But under the any majority rule, a juror who dissents on one issue is allowed to vote on subsequent issues. A juror who disagreed on the question of negligence would still be eligible to provide the vote needed to reach a five-sixths majority on the question of damages. This flexibility reduces the risk of hung juries, as well as all of the associated costs and delays, thus advancing the policy of judicial efficiency underlying § 25-1125 better than the same juror rule. See, *Young v. J.B. Hunt Transp., Inc.*, 781 S.W.2d 503 (Ky. 1989); *Williams v. James*, 113 N.J. 619, 552 A.2d 153 (1989); *Schabe v Hampton Bays*, 103 A.D.2d 418, 480 N.Y.S.2d 328 (1984); *Jaurez v. Superior Court of Los Angeles Cty.*, 31 Cal. 3d 759, 647 P.2d 128, 183 Cal. Rptr. 852 (1982).

Those courts that have adopted the same juror rule have generally conceded that it will lead to less judicial efficiency than the any majority rule. They have argued, however, that two other principles are more important than judicial efficiency, unanimity of the statutorily required minimum number of jurors and consistency in individual juror voting. David A. Lombardero, *Do Special Verdicts Improve the Structure of Jury Decision-Making?*, 36 *Jurimetrics J.* 275 (1996). We are not persuaded by either argument.

Those courts that have relied upon unanimity in adopting the same juror rule see the verdict as a “non-fragmentable totality,” representing “one ultimate finding on the basis of several issues.” H. William Walker, Jr., Comment, *Vote Distribution in*

Non-Unanimous Jury Verdicts, 27 Wash. & Lee L. Rev. 360, 363-64 (1970). Thus, the verdict cannot be “‘the product of mixed thoughts.’” *Clark v. Strain et al*, 212 Or. 357, 364, 319 P.2d 940, 943 (1958) (quoting *The State v. Bybee*, 17 Kan. 462 (1877)). Instead, it must represent the unified thinking of the statutorily required minimum number of jurors.

This reasoning is misplaced. “The requirement of the same jurors agreeing, which is a necessary characteristic of a unanimous verdict, needs [sic] not remain when there has been a change permitting less than unanimity to be the jury’s verdict.” *Naumburg v. Wagner*, 81 N.M. 242, 245, 465 P.2d 521, 524 (N.M. App. 1970). We see no reason to “maintain the semblance of unanimity after the requirement of unanimity ceases to exist.” *Id.* See, also, *Williams v. James*, *supra*.

More recent decisions adopting the same juror rule have relied primarily upon the principle of consistency. See, *O’Connell v. Chesapeake & Ohio RR.*, 58 Ohio St. 3d 226, 569 N.E.2d 889 (1991); *Ferguson v. Northern States Power Co.*, 307 Minn. 26, 239 N.W.2d 190 (1976). These courts contend that inconsistent votes on related issues “indicate that the jurors disagree or do not comprehend.” Lombardero, *supra*, at 301. They also question the ability of jurors in the dissenting minority on one issue “to cast aside their opinions and vote on subsequent issues as if they agreed with the majority.” *Id.* Courts have been particularly concerned about the ability of a juror who dissented on the question of who was negligent to fairly participate on the question of how to apportion negligence. See, e.g., *O’Connell v. Chesapeake & Ohio RR.*, 58 Ohio St. 3d at 235, 569 N.E.2d at 897 (“where a juror finds that a plaintiff has not acted in a causally negligent manner, it is incomprehensible to then suggest that this juror may apportion some degree of fault to the plaintiff and thereby diminish or destroy the injured party’s recovery”).

We are not persuaded that the concerns over consistency are enough to reject the benefits of the any majority rule. We have more faith in the mental capabilities and ethical integrity of jurors than the courts that have adopted this line of reasoning. We refuse to presume that a juror who dissents on one issue will violate his or her oath and attempt to subvert the deliberations on a subsequent issue, even if the issues are integrally related.

See *Ward v. Weekes*, 107 N.J. Super. 351, 258 A.2d 379 (1969). In our view, it is more likely that a juror who is outvoted on one issue can “‘accept the outcome and continue to deliberate with other jurors honestly and conscientiously to decide the remaining issues.’” *Jaurez v. Superior Court of Los Angeles Cty.*, 31 Cal. 3d 759, 768, 647 P.2d 128, 133, 183 Cal. Rptr. 852, 857 (1982) (quoting *Ward v. Weekes*, *supra*).

Moreover, the same juror rule sacrifices a principle of the jury system that is more fundamental than either unanimity or consistency. That principle is that “all members of a jury . . . partake meaningfully in [the] disposition of the case.” *Schabe v Hampton Bays*, 103 A.D.2d 418, 424, 480 N.Y.S.2d 328, 333 (1984). The same juror rule reduces the ability of a juror who dissents on one issue to meaningfully participate in the discussion of the remaining issues. The dissenter remains free to express his or her opinions on the remaining issues, but with the power to persuade divorced from the power to vote, the dissenter’s influence is reduced to “a state of practical impotence.” *Schabe v Hampton Bays*, 103 A.D.2d at 424, 480 N.Y.S.2d at 333.

By contrast, the any majority rule preserves the principle of full participation in the deliberative process. A juror who dissents on one issue retains the ability to vote on subsequent issues. Thus, the power to vote remains united with the power to debate and the dissenter can deliberate fully and effectively on each issue presented to the jury.

[6] Accordingly, because we believe that it furthers judicial efficiency while protecting fundamental fairness better than the same juror rule, we adopt the any majority rule. A juror is free to deliberate and vote on each issue presented to the jury, even if the juror has dissented from the majority on a previous issue. Even though a juror, who disagreed on the question of who was liable, provided the 10th vote necessary on the damages and apportionment questions, the verdict was valid.

2. LIFE CARE PLAN

At trial, the Gourleys called Winkler, a specialist in physical medicine and rehabilitation, to testify about the life care plan that he had developed for Colin. A life care plan is a comprehensive document which includes the items of service, medications,

doctor's visits, and equipment a disabled person will need over the course of his or her life, as well as the costs associated with each of these items. During the direct examination of Winkler, each page of the life care plan was displayed to the jury and received into evidence.

As we understand their brief, Knolla and the OB/GYN Group make two complaints about Winkler's testimony and the life care plan. First, they claim that the life care plan and some of Winkler's testimony contained opinions that were too uncertain to be relevant. Second, they argue that the life care plan was inadmissible hearsay.

(a) Relevance

During direct examination, Winkler admitted that for several of the items that he included in Colin's life care plan, he could not state to a reasonable degree of medical certainty that Colin would require that item in the future. He explained that he included these items in the life care plan "to provide information to everybody involved just to help make decisions."

Knolla and the OB/GYN Group argue that the court erred in allowing Winkler to testify about those items for which he was not reasonably certain Colin would need in the future. Similarly, they argue that the life care plan should not have been admitted into evidence because it contained information about these items. We agree, but conclude that the error was harmless.

[7-11] An expert's opinion need not be expressed with reasonable certainty within the expert's field of expertise, but may be expressed with reasonable probability. The expert's opinion must be sufficiently definite and relevant to provide a basis for the fact finder's determination of an issue or question. *Renne v. Moser*, 241 Neb. 623, 490 N.W.2d 193 (1992). Expert testimony should not be received if it appears the witness is not in possession of such facts as will enable him or her to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture. *Frankson v. Crossroads Joint Venture*, 257 Neb. 597, 599 N.W.2d 603 (1999). When an expert's opinion is mere speculation or conjecture, it is irrelevant. See *Snyder v. Contemporary Obstetrics & Gyn.*, 258 Neb. 643, 605 N.W.2d 782 (2000). Whether an expert's opinion is too speculative to be admitted is a question for the trial

court's discretion. See, *id.*; *Anderson/Couvillon v. Nebraska Dept. of Soc. Servs.*, 253 Neb. 813, 572 N.W.2d 362 (1998).

Winkler admitted that he included information in the life care plan about items for which he was not reasonably certain Colin would need in the future. The context of his testimony makes clear that he was guessing that Colin might possibly need these items. An expert opinion which is merely speculation or conjecture is inadmissible. Here, the court erred by allowing Winkler to testify about the items for which he admitted that he was not reasonably certain Colin would need in the future. Similarly, information about these items should have been redacted from the life care plan before it was accepted into evidence.

[12-15] That does not, however, end the inquiry. Not every error justifies a new trial; only an error which is prejudicial to the rights of the unsuccessful party does so. *Westgate Rec. Assn. v. Papio-Missouri River NRD*, 250 Neb. 10, 547 N.W.2d 484 (1996). In the absence of such an error, the successful party, having sustained the burden and expense of trial, may keep the benefit of the verdict. *Id.* In a civil case, the admission or exclusion of evidence which unfairly prejudices a substantial right of the complaining litigant constitutes reversible error. *State v. Whitlock*, 262 Neb. 615, 634 N.W.2d 480 (2001). When it appears from the record that evidence wrongfully admitted in a jury trial did not affect the result of the trial unfavorably to the party against whom it was admitted, its reception is not prejudicial error. See *Westgate Rec. Assn. v. Papio-Missouri River NRD*, *supra*.

Here, the record shows that although information about items which Colin was not reasonably certain to need in the future was wrongfully admitted into evidence, the receipt did not affect the result of the trial. Instead, the record shows that the jury knew which items Winkler was not reasonably certain Colin would need; that the court instructed the jury to consider only items Colin was reasonably certain to need; and that consistent with the instruction, the jury excluded those items in making its award.

Winkler treated items differently in the life care plan if he was not reasonably certain Colin would need them, and he explained these differences to the jury.

The first part of the life care plan is a 28-page spreadsheet. It provided information about each item that Winkler believed Colin

would need or might need because of his disability. The items are listed in horizontal rows. Spaces appear in each row that allowed Winkler to provide eight types of information about each item as follows: (1) when Colin would need the item, (2) how many years Colin would need it, (3) how often Colin would need it, (4) the purpose of the item, (5) the likely vendor of the item, (6) a range of per-unit prices for the item, (7) a range of per-year prices for the item, (8) and any additional comments that Winkler believed necessary to explain the item. Winkler testified that if he was reasonably certain that Colin would need an item in the future, he provided an estimate in the space for the range of per-year prices, but that if he was not reasonably certain that Colin would need the item, he left that space blank.

The second portion of the life care plan was designed to demonstrate how much an item would cost over the course of Colin's life. Every item listed in the first portion of the life care plan was also listed in the second. But, as he explained to the jury, Winkler included only an estimate as to how much an item would cost over the course of Colin's life if he was reasonably certain Colin would need the item in the future. If he was not reasonably certain Colin would need the item, he put zero for the cost of the item. At the end of the second section of the life care plan, Winkler provided a total sum of \$12,461,500.22 for all of the items in the life care plan which he was reasonably certain Colin would need.

The jury was aware of exactly which items in the life care plan Winkler was not reasonably certain Colin would need in the future. Moreover, at the end of the trial, the jury was told that it could not consider such information. The court instructed the jury that it could award the "reasonable value of medical, hospital, nursing, therapy, rehabilitation, medical equipment and similar care and supplies reasonably needed by and actually provided to the Plaintiffs and *reasonably certain to be provided in the future.*" (Emphasis supplied.)

It is clear that the jury followed the instruction and excluded from its final award those items which Winkler was not reasonably certain Colin would need. As noted, Winkler estimated the total cost to be \$12,461,500.22 over the course of Colin's life for items which he was reasonably certain Colin would need. Later

in the trial, an economist testified that the present value of that amount, depending on which discount factor was used, was a minimum of \$5,943,111. But the jury awarded only \$5 million in damages. Thus, the jury did not even award damages for each of the items Winkler had testified that he was reasonably certain Colin would need, let alone the items for which Winkler was not reasonably certain Colin would need. We conclude that although the court erroneously admitted irrelevant information about items which Winkler was not reasonably certain Colin would require, the error was harmless because it did not unfavorably affect the result of the trial.

(b) Hearsay

At trial, the Gourleys displayed each page of the life care plan to the jury during Winkler's testimony. When his testimony was over, the court received the life care plan into evidence. As we understand their brief, Knolla and the OB/GYN Group argue that the life care plan was hearsay. They claim that as a result, the Gourleys should not have been allowed to show the life care plan to the jury during Winkler's testimony and that the court should not have received the life care plan into evidence. See *State v. Whitlock*, 262 Neb. 615, 634 N.W.2d 480 (2001) (holding expert's written appraisal inadmissible as hearsay which would unfairly emphasize his trial testimony).

[16] Knolla and the OB/GYN Group, however, failed to preserve a hearsay objection to the life care plan. One may not on appeal assert a different ground for excluding evidence than was urged in the objection made to the trial court. *Benzel v. Keller Indus.*, 253 Neb. 20, 567 N.W.2d 552 (1997). The only grounds upon which Knolla and the OB/GYN Group objected to the life care plan were foundation, relevancy, speculation, and conjecture; they did not object to the life care plan because it was hearsay.

[17] We note that one of their codefendants objected because the life care plan was a "narrative memorialization of testimony in a written form of the type that is normally not received." While this might be construed as a hearsay objection, Knolla and the OB/GYN Group did not join the objection. If a defendant does not offer an objection and does not expressly adopt a codefendant's objection, the matter is not preserved for him or her on

appeal. See, *Seaside Resorts v. Club Car*, 308 S.C. 47, 416 S.E.2d 655 (S.C. App. 1992); *Cook Associates, Inc. v. Warnick*, 664 P.2d 1161 (Utah 1983); *Thomas v. Bank of Springfield*, 631 S.W.2d 346 (Mo. App. 1982); *Wolfe v. East Texas Seed Co.*, 583 S.W.2d 481 (Tex. Civ. App. 1979). We will not consider the argument that the life care plan was hearsay.

3. "WHAT TO EXPECT WHEN YOU'RE EXPECTING"

Knolla and the OB/GYN Group assert that the district court erred in receiving into evidence the book entitled "What to Expect When You're Expecting" (hereinafter the book). During the cross-examination of Knolla, the Gourleys marked the book as an exhibit and asked Knolla several questions about it. The Gourleys then offered the book into evidence. Knolla objected on the grounds that the book was hearsay and that it was irrelevant. In response, the Gourleys' counsel stated that the book was being offered only to show what information the OB/GYN Group would have provided to its patients in 1993. The court overruled the objections and received the book into evidence.

[18,19] Initially, Knolla and the OB/GYN Group claim that the book contained inadmissible hearsay statements. Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Neb. Rev. Stat. § 27-801(3) (Reissue 1995). Out-of-court statements, if not offered for the purpose of proving the truth of the facts asserted, are not hearsay. *Wiekhorst Bros. Excav. & Equip. v. Ludewig*, 247 Neb. 547, 529 N.W.2d 33 (1995). Here, the book was not offered for the truth of its contents, but instead was offered for the limited purpose of showing what information the OB/GYN Group would have provided to its patients in 1993. The book was not hearsay.

Knolla and the OB/GYN Group also argue that the court should have excluded the book under Neb. Rev. Stat. § 27-403 (Reissue 1995) because its probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. But, "one may not on appeal assert a different ground for excluding evidence than was urged in the objection made to the trial court." *Benzel v. Keller Indus., Inc.*, 253 Neb. 20, 26, 567 N.W.2d 552, 557 (1997). The only

objections Knolla and the OB/GYN Group made at trial about the book were hearsay and relevance, the first of which is without merit for the reasons set out above and the second of which has not been raised on appeal. We will not consider the § 27-403 argument.

4. CONSTITUTIONAL ISSUES

Knolla and the OB/GYN Group argue that the cap in § 44-2825(1) is constitutional. The Gourleys argue that the cap violates principles of (1) special legislation, (2) equal protection, (3) open courts and right to a remedy, (4) right to a jury trial, (5) taking of property, and (6) separation of powers. The Gourleys rely solely on provisions of the state Constitution.

The Gourleys do not argue that the cap violates substantive due process or deprives them of life, liberty, and the pursuit of happiness as listed in their motion for new trial. Other than arguing equal protection, the Gourleys do not argue that Neb. Const. art. I, § 3, applies to their case. The Gourleys also did not argue to the trial court that the cap is unconstitutional as applied, nor do they make that argument on appeal.

[20] When specific constitutional questions are presented, courts will not search for constitutional authority that was not raised and argued by the parties to overthrow a legislative enactment. See, e.g., *United States v. Spector*, 343 U.S. 169, 72 S. Ct. 591, 96 L. Ed. 863 (1952) (alternate constitutional ground for overturning statute not considered when appellee did not brief and argue issue); *Rice v. Rigsby and Davis v. Rigsby*, 259 N.C. 506, 131 S.E.2d 469 (1963) (addressing only constitutional issues raised in appellee's brief). Thus, we will consider only the specific constitutional arguments that the Gourleys raise and argue. See *Rice v. Rigsby and Davis v. Rigsby*, *supra*. Because we are asked to review numerous alternate grounds for finding the cap unconstitutional, we generally address the constitutional issues concerning the Gourleys' contentions.

(a) Statutory Provisions and Background

The Nebraska Hospital-Medical Liability Act was created to address a perceived medical liability crisis. The act created a medical review panel, capped the amount of damages that could

be recovered, and created the Excess Liability Fund. Neb. Rev. Stat. §§ 44-2801 et seq. (Reissue 1998). Under the act, health care providers that do not opt out of the act's coverage must file proof of financial responsibility with the Director of Insurance and pay surcharges for the excess liability fund. §§ 44-2821 and 44-2824. The act allows patients to opt out of the act's coverage. § 44-2821(3). Section 44-2825 provides:

(1) The total amount recoverable under the Nebraska Hospital-Medical Liability Act from any and all health care providers and the Excess Liability Fund for any occurrence resulting in any injury or death of a patient may not exceed . . . (c) one million two hundred fifty thousand dollars for any occurrence after December 31, 1992.

(2) A health care provider qualified under the act shall not be liable to any patient or his or her representative who is covered by the act for an amount in excess of two hundred thousand dollars for all claims or causes of action arising from any occurrence during the period that the act is effective with reference to such patient.

(3) Subject to the overall limits from all sources as provided in subsection (1) of this section, any amount due from a judgment or settlement which is in excess of the total liability of all liable health care providers shall be paid from the Excess Liability Fund pursuant to sections 44-2831 to 44-2833.

(b) Special Legislation

The Gourleys contend that § 44-2825(1) is unconstitutional special legislation because it provides a special privilege to health care professionals while placing a burden on the most severely injured plaintiffs.

Neb. Const. art. III, § 18, provides:

The Legislature shall not pass local or special laws in any of the following cases, that is to say:

. . . .

Granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever In all other cases where a general law can be made applicable, no special law shall be enacted.

[21] We described the purpose of the constitutional safeguard against special legislation in *Haman v. Marsh*, 237 Neb. 699, 709, 467 N.W.2d 836, 844-45 (1991), as follows:

By definition, a legislative act is general, and not special, if it operates alike on all persons of a class or on persons who are brought within the relations and circumstances provided for and if the classification so adopted by the Legislature has a basis in reason and is not purely arbitrary. . . . General laws embrace the whole of a subject, with their subject matter of common interest to the whole state. Uniformity is required in order to prevent granting to any person, or class of persons, the privileges or immunities which do not belong to all persons. . . . It is because the legislative process lacks the safeguards of due process and the tradition of impartiality which restrain the courts from using their powers to dispense special favors that such constitutional prohibitions against special legislation were enacted.

Thus, the focus of the prohibition against special legislation is the prevention of legislation which arbitrarily benefits or grants “special favors” to a specific class.

[22] A legislative act constitutes special legislation if (1) it creates an arbitrary and unreasonable method of classification or (2) it creates a permanently closed class. *Bergan Mercy Health Sys. v. Haven*, 260 Neb. 846, 620 N.W.2d 339 (2000). This case does not involve a permanently closed class.

[23-25] We have consistently stated that the test for determining the constitutionality of classifications is as follows:

“A legislative classification, in order to be valid, must be based upon some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation with respect to objects to be classified. Classifications for the purpose of legislation must be real and not illusive; they cannot be based on distinctions without a substantial difference. . . .” “Classification is proper if the special class has some reasonable distinction from other subjects of a like general character, which distinction bears some reasonable relation to the legitimate objectives and purposes

of the legislation. The question is always whether the things or persons classified by the act form by themselves a proper and legitimate class with reference to the purpose of the act.”

State ex rel. Douglas v. Marsh, 207 Neb. 598, 609, 300 N.W.2d 181, 187 (1980). See, e.g., *Bergan Mercy Health Sys. v. Haven*, *supra*; *Big Johns Billiards v. Balka*, 260 Neb. 702, 619 N.W.2d 444 (2000); *Haman v. Marsh*, *supra*.

We note that a special legislation analysis is similar to an equal protection analysis, and often the two are discussed together because, at times, both issues can be decided on the same facts. See, generally, *Pfizer v. Lancaster Cty. Bd. of Equal.*, 260 Neb. 265, 616 N.W.2d 326 (2000) (addressing equal protection and special legislation separately, but deciding issues for same reasons). As a result, language normally applied to an equal protection analysis is sometimes used to help explain the reasoning employed under a special legislation analysis. *Id.* But the focus of each test is different. The analysis under a special legislation inquiry focuses on the Legislature’s purpose in creating the class and asks if there is a substantial difference of circumstances to suggest the expediency of diverse legislation. This is different from an equal protection analysis under which the state interest in legislation is compared to the statutory means selected by the Legislature to accomplish that purpose. Under an equal protection analysis, differing levels of scrutiny are applied depending on if the legislation involves a suspect class. See, e.g., *Kuchar v. Krings*, 248 Neb. 995, 540 N.W.2d 582 (1995) (discussing special legislation and equal protection separately and applying differing tests); *Lerma v. Keck*, 186 Ariz. 228, 921 P.2d 28 (Ariz. App. 1996) (illustrating difference between equal protection and special legislation); *Etheridge v. Medical Center Hospitals*, 237 Va. 87, 376 S.E.2d 525 (1989) (upholding damages cap and discussing special legislation and equal protection separately).

This court has upheld the constitutionality of the Nebraska Hospital-Medical Liability Act. *Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977). Discussing equal protection, we first held there was a reasonable basis for the classification. Then, in response to the argument that the medical review panel constituted

a special privilege for the health care provider and imposed an undue burden on the seriously injured patient, we stated:

In this respect it must be remembered the Nebraska procedure is an elective one. Under the election, the act guarantees the claimant an assured fund . . . for the payment of any malpractice claim he [or she] may have. Under the common law remedy [the claimant] had no such guarantee and, as in the case of the plaintiff Prendergast, who has been unable to acquire any malpractice insurance, the likelihood of collecting a substantial judgment could be quite remote.

Additionally, the claimant is assured of a procedure which will provide him access to an impartial medical review panel to determine whether the health care provider met the applicable standard of care. In return, claimant by his election agrees to the [cap]. . . . [T]he classification rests on reasons of public policy and a substantial difference between medical care providers and other tort-feasors. Suffice it to say that the constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective.

. . . Nothing in the act suggests, as defendant infers, that the legislation involved was enacted for the relief of the medical care provider. The enactment was, and so appears to us to be, in the public interest. This is paramount.

Id. at 115, 256 N.W.2d at 669.

The Gourleys argue that *Prendergast* is not precedent because it did not have a four-judge majority. But, under Neb. Const. art. V, § 2, only three judges are necessary to determine that an act is constitutional. Further, even before *Prendergast* was decided, this court recognized the Legislature's concern over the rising cost of malpractice insurance and the substantial difference between medical practitioners and other tort-feasors. When holding that the statute of limitations for malpractice actions did not constitute special legislation, we stated:

There are substantial reasons for legislative discrimination in regard to this field. We have seen in recent years the growth of malpractice litigation to the point where numerous insurance companies have withdrawn from this field. Insurance rates are practically prohibitive so that many

professional people must either remain unprotected or pass the insurance charges along to their patients and clientele in the form of exorbitant fees and charges. This unduly burdens the public which requires professional services.

Taylor v. Karrer, 196 Neb. 581, 586, 244 N.W.2d 201, 204 (1976), *disapproved on other grounds*, *Jorgensen v. State Nat. Bank & Trust*, 255 Neb. 241, 583 N.W.2d 331 (1998).

After *Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977), was decided, we relied on it when determining that a different cap on damages was constitutional. In *Distinctive Printing & Packaging Co. v. Cox*, 232 Neb. 846, 443 N.W.2d 566 (1989), we upheld the constitutionality of a limit of recovery of damages under the parental liability statute, Neb. Rev. Stat. § 43-801 (Reissue 1998). In determining that § 43-801 did not violate principles of equal protection or the prohibition against special legislation, we cited *Prendergast* for the proposition that “certain limitations on recovery and differentiation among types of tort-feasors are permissible.” *Distinctive Printing & Packaging Co. v. Cox*, 232 Neb. at 852, 443 N.W.2d at 572. We again cited *Prendergast* with favor in 1991. *Haman v. Marsh*, 237 Neb. 699, 713, 467 N.W.2d 836, 847 (1991) (“there are substantial reasons for legislative discrimination in regard to malpractice actions”). Further, in 2000, this court quoted and relied on language from *Prendergast*, stating that in *Prendergast*, we were “dealing with the fundamental right to adequate medical care” and affirming “‘the right of the Legislature to exercise the police power to promote the general health and welfare of the citizens of this state.’” *Bergan Mercy Health Sys. v. Haven*, 260 Neb. 846, 857, 620 N.W.2d 339, 348 (2000). We also quoted *Prendergast* as follows:

“Defendant . . . assumes the legislation was enacted to relieve doctors or insurance companies of some of their burden. We do not accept defendant’s premise. Doctors and insurance companies are able to protect themselves against financial burdens by passing the cost on to their patients. Because they were doing so, [they] created part of the problem. The Legislature deemed it necessary to exercise its police power to make available qualified medical services at reasonable prices for the Nebraska public. We find no constitutional violation of this effort.”

Bergan Mercy Health Sys. v. Haven, 260 Neb. at 857, 620 N.W.2d at 348. Thus, we have recognized on repeated occasions that the classification in the Nebraska Hospital-Medical Liability Act is based upon a reason of public policy. Further, we have recognized the existence of a substantial difference of situation or circumstances that justified diverse legislation for the classification.

The Gourleys argue, however, that § 44-2825(1) was not justified. The Gourleys point out that there was disagreement in the Legislature at the time § 44-2825(1) was enacted and conflicting testimony at the hearing on the motion for new trial. Thus, they argue that there never was an insurance crisis and that lifting the cap would have little effect on the cost of medical services. The Gourleys essentially ask that we independently review the wisdom of enacting the cap. We decline to do so.

[26,27] Statutes are afforded a presumption of constitutionality, and the unconstitutionality of a statute must be clearly established before it will be declared void. *Bergan Mercy Health Sys. v. Haven*, *supra*. The Nebraska Legislature is presumed to have acted within its constitutional power despite that, in practice, its laws may result in some inequality. *Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977).

[28,29] It is commonly held that courts will not reexamine independently the factual basis on which a legislature justified a statute, nor will a court independently review the wisdom of the statute. See, e.g., *Phillips v. Mirac, Inc.*, 251 Mich. App. 586, 651 N.W.2d 437 (2002); *Guzman v. St. Francis Hospital, Inc.*, 240 Wis. 2d 559, 623 N.W.2d 776 (Wis. App. 2000); *Robinson v. Charleston Area Med. Center*, 186 W. Va. 720, 414 S.E.2d 877 (1991). See, generally, *Evans ex rel. Kutch v. State*, 56 P.3d 1046 (Alaska 2002). Instead, courts have inquired into “whether the legislature reasonably could conceive to be true the facts on which the challenged statute was based.” *Robinson v. Charleston Area Med. Center*, 186 W. Va. at 730, 414 S.E.2d at 887. See *Prendergast v. Nelson*, *supra*. See, also, *Phillips v. Mirac, Inc.*, *supra* (considering whether any set of facts either known or which could be reasonably assumed supports legislature’s judgment). As one author has stated:

The legislature has the ability to hear from everybody—plaintiff’s lawyers, health care professionals, defense

lawyers, consumer groups, unions, and large and small business. . . . And, ultimately, legislators make a judgment. If the people who elected the legislators do not like the solution, the voters have a good remedy every two years: retire those who supported laws the voter's disfavor. These are but a few reasons why, over the years, legislators have received some due deference from courts.

Victor Schwartz, *Judicial Nullification of Tort Reform: Ignoring History, Logic, and Fundamentals of Constitutional Law*, 31 Seton Hall L. Rev. 688 (2001). This court does not sit as a super-legislature to review the wisdom of legislative acts. *State v. Hunt*, 220 Neb. 707, 371 N.W.2d 708 (1985), *disapproved on other grounds*, *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986); *Verba v. Ghaphery*, 210 W. Va. 30, 552 S.E.2d 406 (2001).

[30-32] Also, all reasonable intendments must be indulged to support the constitutionality of legislative acts, including classifications adopted by the Legislature. *State v. Hunt*, *supra*. If the Legislature had any evidence to justify its reasons for passing the act, then it is not special legislation if the class is based upon some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation concerning the objects to be classified. See *Prendergast v. Nelson*, *supra*. We reach this determination by considering what the Legislature could have found at the time the act was passed. See, generally, *Ralston v. County of Dawson*, 200 Neb. 678, 264 N.W.2d 868 (1978).

[33] It is not this court's place to second-guess the Legislature's reasoning behind passing the act. Likewise, "it is up to the legislature and not this Court to decide whether its legislation continues to meet the purposes for which it was originally enacted." *Verba v. Ghaphery*, 210 W. Va. at 36, 552 S.E.2d at 412 (upholding constitutionality of damages cap). Because we give deference to legislative factfinding and presume statutes to be constitutional, any argument that the record contains evidence that the act was not wise or necessary when it was enacted does not change the analysis.

Section 44-2825 was adopted under 1976 Neb. Laws, L.B. 434, but the legislative history is found under 1976 Neb. Laws, L.B. 703. At the committee hearing, the Legislature heard from

both proponents and opponents of the act. There was testimony from witnesses indicating that there was a problem recruiting physicians in the state and that increases in medical malpractice insurance were raising the cost of medical care. Public Health and Welfare Committee Hearing, L.B. 703, 84th Leg., 2d Sess. (Jan. 27, 1976). There was also testimony that a cap would not affect the cost of medical care, and some expressed the belief that the act was nothing more than a boon for insurance companies. *Id.* Generally, the proponents of the act expressed concern that an insurance crisis existed, but admitted that it was likely impossible to know if a cap on damages would solve the problem. Based on the information before it, the Legislature generally believed that a damages cap would solve the problem, especially when combined with the medical review panel and the Excess Liability Fund. *Id.* Thus, the Legislature set out a specific statement of findings and intent in the Nebraska Hospital-Medical Liability Act. In § 44-2801, the Legislature stated:

(1) The Legislature finds and declares that it is in the public interest that competent medical and hospital services be available to the public in the State of Nebraska at reasonable costs, and that prompt and efficient methods be provided for eliminating the expense as well as the useless expenditure of time of physicians and courts in nonmeritorious malpractice claims and for efficiently resolving meritorious claims. It is essential in this state to assure continuing availability of medical care and to encourage physicians to enter into the practice of medicine in Nebraska and to remain in such practice as long as such physicians retain their qualifications.

(2) The Legislature further finds that at the present time under the system in effect too large a percentage of the cost of malpractice insurance is received by individuals other than the injured party. The intent of sections 44-2801 to 44-2855 is to serve the public interest by providing an alternative method for determining malpractice claims in order to improve the availability of medical care, to improve its quality and to reduce the cost thereof, and to [e]nsure the availability of malpractice insurance coverage at reasonable rates.

Here, the Legislature had evidence to justify their reasons for passing the act. The class is based upon reasons of public policy and substantial differences of situation or circumstances that suggested the justice or expediency of diverse legislation.

Other states have also expressed agreement that a cap on damages for medical malpractice does not constitute special legislation. See *Etheridge v. Medical Center Hospitals*, 237 Va. 87, 376 S.E.2d 525 (1989). See, also, *Kirkland v. Blaine County Medical Center*, 134 Idaho 464, 4 P.3d 1115 (2000). There is recognition by both this court and others that there is evidence to justify the Legislature's actions.

[34] To the extent that other courts have found damages caps to constitute special legislation, those cases do not conform to our legal precedent and are unpersuasive. See, e.g., *Best v. Taylor Mach. Works*, 179 Ill. 2d 367, 689 N.E.2d 1057, 228 Ill. Dec. 636 (1997) (Miller, J., concurring in part, and in part dissenting) (explaining reasons for disagreement with special legislation analysis as applied in *Best*). See, also, Matthew W. Light, Note, *Who's the Boss?: Statutory Damage Caps, Courts, and State Constitutional Law*, 58 Wash. & Lee L. Rev. 315 (2001) (criticizing cases holding that damages caps are unconstitutional). We conclude that the cap does not violate principles prohibiting special legislation.

(c) Equal Protection

The Gourleys next contend that the cap violates the equal protection clause of the Nebraska Constitution. They first argue that the cap affects fundamental rights and ask that this court apply a "searching" or rigorous review. Brief for appellees the Gourleys at 56.

[35] Neb. Const. art. I, § 3, states: "No person shall be deprived of life, liberty, or property, without due process of law, nor be denied equal protection of the laws." The party attacking a statute as violative of equal protection has the burden to prove that the classification violates the Equal Protection Clause. See *Pick v. Nelson*, 247 Neb. 487, 528 N.W.2d 309 (1995).

[36-41] The Equal Protection Clause does not forbid classifications; it simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike.

Pfizer v. Lancaster Cty. Bd. of Equal., 260 Neb. 265, 616 N.W.2d 326 (2000). In any equal protection challenge to a statute, the degree of judicial scrutiny to which the statute is to be subjected may be dispositive. If a legislative classification involves either a suspect class or a fundamental right, courts will analyze the statute with strict scrutiny. Under this test, strict accordance must exist between the classification and the statute's purpose. The result the Legislature seeks to effectuate must be a compelling state interest, and the means employed in the statute must be such that no less restrictive alternative exists. On the other hand, if a statute involves economic or social legislation not implicating a fundamental right or suspect class, courts will ask only whether a rational relationship exists between a legitimate state interest and the statutory means selected by the Legislature to accomplish that end. Upon a showing that such a rational relationship exists, courts will uphold the legislation. *Schindler v. Department of Motor Vehicles*, 256 Neb. 782, 593 N.W.2d 295 (1999); *State v. Garber*, 249 Neb. 648, 545 N.W.2d 75 (1996). Some legislative classifications, such as those based on gender, are reviewed under an intermediate level of scrutiny. See, e.g., *Friehe v. Schaad*, 249 Neb. 825, 545 N.W.2d 740 (1996).

A majority of jurisdictions apply a rational basis or other similar test and determine that a statutory cap on damages does not violate equal protection. See, e.g., *Phillips v. Mirac, Inc.*, 251 Mich. App. 586, 651 N.W.2d 437 (2002); *Guzman v. St. Francis Hospital, Inc.*, 240 Wis. 2d 559, 623 N.W.2d 776 (Wis. App. 2000); *Scholz v. Metropolitan Pathologists, P.C.*, 851 P.2d 901 (Colo. 1993) (en banc); *Murphy v. Edmonds*, 325 Md. 342, 601 A.2d 102 (1992); *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898 (Mo. 1992) (en banc); *Butler v. Flint Goodrich Hosp.*, 607 So. 2d 517 (La. 1992); *Peters v. Saft*, 597 A.2d 50 (Me. 1991); *Robinson v. Charleston Area Med. Center*, 186 W. Va. 720, 414 S.E.2d 877 (1991); *Fein v. Permanente Medical Group*, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368 (1985); *Etheridge v. Medical Center Hospitals*, 237 Va. 87, 376 S.E.2d 525 (1989); *Johnson v. St. Vincent's Hospital*, 273 Ind. 374, 404 N.E.2d 585 (1980), *abrogated on other grounds*, *Collins v. Day*, 644 N.E.2d 72 (Ind. 1994). See, also, *Evans ex rel. Kutch v. State*, 56 P.3d 1046 (Alaska 2002) (reaching this conclusion but stating that it

was not binding precedent); *Trujillo v. City of Albuquerque*, 125 N.M. 721, 965 P.2d 305 (1998) (overruling use of heightened standard, but remanding for determination of constitutionality under rational basis standard); *Morris v. Savoy*, 61 Ohio. St. 3d 684, 576 N.E.2d 765 (1991) (finding no violation of equal protection, but finding damages cap unconstitutional on other grounds). A few jurisdictions have applied a heightened standard under their state constitution. See, *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980); *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978).

The Gourleys contend that a heightened level of scrutiny should be applied to this case because the cap affects fundamental rights such as the right to a jury trial, full remedy, property, and medical care. They also argue that the cap affects a suspect class because plaintiffs with damages awards over the cap are “‘saddled with disabilities.’” Brief for appellees the Gourleys at 51. They also appear to argue that heightened scrutiny should apply because the Nebraska Unicameral system is more susceptible to influences from special interests. We disagree that a heightened level of scrutiny should be applied.

[42] The right of access to the courts is important, but that right is impaired only by state action that limits or blocks access to the courts. See, generally, *Evans ex rel. Kutch v. State*, *supra*. The damages cap at issue does not limit access to the courts. Instead, it limits a plaintiff’s recovery in court. *Id.* Further, access to the courts to pursue redress for injuries is not the type of fundamental right which requires heightened scrutiny. *Guzman v. St. Francis Hospital, Inc.*, *supra*. In addition, the classification created by § 44-2825 is not based on suspect criteria. Instead, the Gourleys’ interest in unlimited damages is economic. See *Guzman v. St. Francis Hospital, Inc.*, *supra*. See, generally, *Evans ex rel. Kutch v. State*, *supra*. We find no merit in the argument that plaintiffs with damages awards over the cap are a suspect class or that heightened scrutiny should be applied because Nebraska has a unicameral legislative system. Because the interests at issue are economic, we apply the rational basis test.

[43-45] Under the rational basis test, the Equal Protection Clause is satisfied as long as there is (1) a plausible policy reason for the classification, (2) the legislative facts on which the

classification is apparently based may rationally have been considered to be true by the governmental decisionmaker, and (3) the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational. *Pfizer v. Lancaster Cty. Bd. of Equal.*, 260 Neb. 265, 616 N.W.2d 326 (2000). The rational relationship standard is the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause. *State v. Atkins*, 250 Neb. 315, 549 N.W.2d 159 (1996). Thus, when determining whether a rational basis exists for a legislative classification, courts look to see if any state of facts can be conceived to reasonably justify the disparate treatment which results. *Distinctive Printing & Packaging Co. v. Cox*, 232 Neb. 846, 443 N.W.2d 566 (1989).

[46-49] As with their arguments about special legislation, the Gourleys contend that the act was unwise and unnecessary. But as we already discussed, we will not second guess the conclusions of the Legislature. Further, in economics and social welfare, a statute does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. *Pfizer v. Lancaster Cty. Bd. of Equal.*, *supra*; *State v. Garber*, 249 Neb. 648, 545 N.W.2d 75 (1996). The fact that other schemes could have been selected does not mean that the scheme chosen is constitutionally infirm. *Id.* See *Pick v. Nelson*, 247 Neb. 487, 528 N.W.2d 309 (1995). As long as the classification scheme chosen by the Legislature rationally advances a reasonable and identifiable governmental objective, a court must disregard the existence of other methods that other individuals might have preferred. See *Pfizer v. Lancaster Cty. Bd. of Equal.*, *supra*. Social and economic measures run afoul of the Equal Protection Clause only when the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that a court can only conclude that the Legislature's actions were irrational. *State v. Atkins*, *supra*.

The district court concluded that § 44-2825 was unconstitutional partially because it is a cap on all damages instead of a cap on only noneconomic damages. This does not change the analysis. A statute will not offend equal protection if a rational relationship exists between a legitimate state interest and the statutory means selected by the Legislature to accomplish that

end. We note that other courts have upheld statutes that cap all damages. See, *Butler v. Flint Goodrich Hosp.*, 607 So. 2d 517 (La. 1992); *Etheridge v. Medical Center Hospitals*, 237 Va. 87, 376 S.E.2d 525 (1989); *Johnson v. St. Vincent's Hospital*, 273 Ind. 374, 404 N.E.2d 585 (1980), *abrogated on other grounds*, *Collins v. Day*, 644 N.E.2d 72 (Ind. 1994).

Here, the Legislature was concerned about a perceived insurance crisis that could affect the ability of the state to recruit and retain physicians and increase the costs of medical care. Reducing health care costs and encouraging the provision of medical services are legitimate goals which can reasonably be thought to be furthered by lowering the amount of medical malpractice judgments. See, generally, *Evans ex rel. Kutch v. State*, 56 P.3d 1046 (Alaska 2002).

We have previously recognized these goals as legitimate legislative concerns. *Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977); *Taylor v. Karrer*, 196 Neb. 581, 244 N.W.2d 201 (1976), *disapproved on other grounds*, *Jorgensen v. State Nat. Bank & Trust Co.*, 255 Neb. 241, 583 N.W.2d 331 (1998). Also, a rational relationship exists between the concern and the statutory means selected by the Legislature to accomplish its goal. We note that § 44-2825 was generally based on an Indiana act. Public Health and Welfare Committee Hearing, L.B. 703, 84th Leg., 2d Sess. 17 (Jan. 27, 1976). In *Johnson v. St. Vincent's Hospital*, *supra*, the Indiana Supreme Court upheld the damages cap in the Indiana act, and it noted that the act established a form of government-sponsored insurance, set limitations upon liability, and placed the burden upon persons injured by the industry. The court then stated:

An insurance operation cannot be sound if the funds collected are insufficient to meet the obligations incurred. It must, however, be accepted that the badly injured plaintiff who may require constant care will not recover full damages, yet at the same time we are impressed with the large amount which is recoverable and its probable ability to fully compensate a large proportion of injured patients. In the same vein, badly injured patients would have little or no chance of recovering large sums of money if the evil the act was intended to prevent were to come about, i.e., that an

environment would develop in the State in which private or public malpractice insurance were unavailable or unused. Of some relevance here is also the fact that after suit and recovery against a health care provider is completed, there continues a total life-time dependency upon other health care providers for vital treatment of the residuum of illness from the prior negligence and of new and unrelated illnesses. Thus to the extent that the limitation upon recovery is successful in preserving the availability of health care services, it does so to the benefit of the entire community including the badly injured plaintiff.

Johnson v. St. Vincent's Hospital, 273 Ind. at 396, 404 N.E.2d at 599. Although one may disagree with this reasoning, the Nebraska Legislature heard similar comments when it was considering enacting § 44-2825. Public Health and Welfare Committee Hearing, L.B. 703, 84th Leg., 2d Sess. (Jan. 27, 1976).

[50] Finally, we note that some jurisdictions have held that a cap on damages violates equal protection. In some cases, the jurisdiction applied a heightened level of scrutiny, which we reject. See, *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980); *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978). Another is unclear about the level of scrutiny. *Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156 (Ala. 1991). Several fail to give deference to the Legislature and engage in judicial factfinding, which we also reject. See, *Moore v. Mobile Infirmary Ass'n*, *supra*; *Arneson v. Olson*, *supra*. Another requires the provision of a replacement remedy, quid pro quo, to limit recovery of damages, which we reject and which will be discussed when dealing with the open courts provision of the Nebraska Constitution. See, e.g., *Wright v. Central Du Page Hosp. Ass'n*, 63 Ill. 2d 313, 347 N.E.2d 736 (1976). We find these cases unpersuasive. Thus, we conclude that the cap on damages in § 44-2825 satisfies principles of equal protection.

(d) Open Courts and Right to Remedy

The Gourleys contend that § 44-2825 violates the open courts provision of the Nebraska Constitution and denies them their right to a remedy. They argue that common-law rights and remedies that were in place at the time the constitution was adopted are protected from legislative change.

Neb. Const. art. I, § 13, provides: "All courts shall be open, and every person, for any injury done him or her in his or her lands, goods, person, or reputation, shall have a remedy by due course of law and justice administered without denial or delay"

A majority of jurisdictions have held that a cap on damages does not violate the open courts and right to remedy provisions of their state constitution. *Guzman v. St. Francis Hospital, Inc.*, 240 Wis. 2d 559, 623 N.W.2d 776 (Wis. App. 2000); *Murphy v. Edmonds*, 325 Md. 342, 601 A.2d 102 (1992); *Robinson v. Charleston Area Med. Center*, 186 W. Va. 720, 414 S.E.2d 877 (1991); *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898 (Mo. 1992) (en banc); *Johnson v. St. Vincent's Hospital*, 273 Ind. 374, 404 N.E.2d 585 (1980), *abrogated on other grounds*, *Collins v. Day*, 644 N.E.2d 72 (Ind. 1994); *Jones v. State Board of Medicine*, 97 Idaho 859, 555 P.2d 399 (1976). See, generally, *Evans ex rel. Kutch v. State*, 56 P.3d 1046 (Alaska 2002); *Trujillo v. City of Albuquerque*, 125 N.M. 721, 965 P.2d 305 (1998). A minority of courts have held that a cap on damages violates a state constitution's open courts or right to remedy provision. *Matter of Certif. of Questions of Law*, 544 N.W.2d 183 (S.D. 1996); *Lucas v. U.S.*, 757 S.W.2d 687 (Tex. 1988).

[51,52] It has long been the law of Nebraska, however, that the Legislature is free to create and abolish rights so long as no vested right is disturbed. *Peterson v. Cisper*, 231 Neb. 450, 436 N.W.2d 533 (1989). When upholding the constitutionality of the review panel provision of the act, we stated in *Prendergast v. Nelson*, 199 Neb. 97, 104, 256 N.W.2d 657, 663-64 (1977):

Basically the contention is that the Legislature is powerless to alter a common law right. The law itself as a rule of conduct may be changed at the will or even at the whim of the Legislature unless prevented by constitutional limitations. . . . The Constitution does not forbid the creation of new rights, nor the abolition of old ones recognized by the common law, to attain a permissible legislative object.

Thus, we have held that no one has a vested interest in any rule of the common law or a vested right in any particular remedy. *Peterson v. Cisper*, *supra*.

The Gourleys contend that rights that were in place when the constitution was adopted are an exception to these rules. In the

alternative, they contend that the Legislature cannot change a remedy without providing an adequate replacement, or quid pro quo. We disagree.

Rejecting an argument that the common law in place at the time the constitution was adopted could not be changed, the Idaho Supreme Court stated: "To adopt that argument would be to hold that the common law as of 1890 governs the health, welfare and safety of the citizens of this state and is unalterable without constitutional amendment." *Jones v. State Board of Medicine*, 97 Idaho at 864, 555 P.2d at 404. Relying on a Colorado case, the court further noted that the open courts provision did not discuss the common law. Instead, the common law was adopted through another constitutional provision and through statute in Idaho. *Jones v. State Board of Medicine*, *supra*, citing *Vogts v. Guerrette*, 142 Colo. 527, 351 P.2d 851 (1960).

In Nebraska, the common law of England was adopted by statute. Neb. Rev. Stat. § 49-101 (Reissue 1998). Thus it exists here by legislative enactment and may be repealed. See *Vogts v. Guerrette*, *supra*. Section 44-2825(1) also does not bar access to the courts or deny a remedy. Instead it redefines the substantive law by limiting the amount of damages a plaintiff can recover. Although plaintiffs have a right to pursue recognized causes of action in court, they are not assured that a cause of action will remain immune from legislative or judicial limitation or elimination. *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898 (Mo. 1992) (en banc).

[53,54] We have also held that if a common-law right is taken away, nothing need be given in return. *Prendergast v. Nelson*, *supra*. Because the Legislature can eliminate a common-law cause of action entirely, it can also alter the remedy for a cause of action without providing a replacement remedy, or quid pro quo. We conclude that § 44-2825(1) does not violate Neb. Const. art. I, § 13.

(e) Jury Trial

The Gourleys contend that the cap violates their right to a trial by jury. Knolla and the OB/GYN Group counter that the Legislature can abolish a common-law cause of action and that

therefore, it follows that it can limit the amount of damages that can be recovered.

Neb. Const. art. I, § 6, provides:

The right of trial by jury shall remain inviolate, but the Legislature may authorize trial by a jury of a less number than twelve in courts inferior to the District Court, and may by general law authorize a verdict in civil cases in any court by not less than five-sixths of the jury.

Courts are split on whether a cap on damages violates the right to a jury trial. The majority of courts hold that a cap does not violate the right to trial by jury. *Phillips v. Mirac, Inc.*, 251 Mich. App. 586, 651 N.W.2d 437 (2002); *Kirkland v. Blaine County Medical Center*, 134 Idaho 464, 4 P.3d 1115 (2000); *Guzman v. St. Francis Hospital, Inc.*, 240 Wis. 2d 559, 623 N.W.2d 776 (Wis. App. 2000); *Scholz v. Metropolitan Pathologists, P.C.*, 851 P.2d 901 (Colo. 1993) (en banc); *Murphy v. Edmonds*, 325 Md. 342, 601 A.2d 102 (1992); *Adams v. Children's Mercy Hosp.*, *supra*; *Etheridge v. Medical Center Hospitals*, 237 Va. 87, 376 S.E.2d 525 (1989). See, generally, *Evans ex rel. Kutch v. State*, 56 P.3d 1046 (Alaska 2002). In two of these cases, the constitutional provision at issue is generally the same as the provision in the Nebraska Constitution. *Kirkland v. Blaine County Medical Center*, *supra*; *Adams v. Children's Mercy Hosp.*, *supra*. Other courts have applied language that is generally the same as the Nebraska Constitution and have concluded that a cap on damages does violate a plaintiff's right to a jury trial. *Lakin v. Senco Products, Inc.*, 329 Or. 62, 987 P.2d 463 (1999); *Matter of Certif. of Questions of Law*, 544 N.W.2d 183 (S.D. 1996); *Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156 (Ala. 1991); *Sofie v. Fibreboard Corp.*, 112 Wash. 2d 636, 771 P.2d 711 (1989), *amended* 780 P.2d 260. We disagree with the reasoning of those courts.

[55,56] The purpose of article I, § 6, is to preserve the right to a jury trial as it existed at common law and under the statutes in force when the constitution was adopted. *State ex rel. Cherry v. Burns*, 258 Neb. 216, 602 N.W.2d 477 (1999); *State ex rel. Douglas v. Schroeder*, 222 Neb. 473, 384 N.W.2d 626 (1986). The primary function of a jury has always been factfinding, which includes a determination of a plaintiff's damages. See

Adams v. Children's Mercy Hosp., 832 S.W.2d 898 (Mo. 1992) (en banc). The court, however, applies the law to the facts. *Id.* Section 44-2825 provides the remedy in a medical malpractice action. The remedy is a question of law, not fact, and is not a matter to be decided by the jury. See, e.g., *Adams v. Children's Mercy Hosp.*, *supra*; *Murphy v. Edmonds*, *supra*; *Etheridge v. Medical Center Hospitals*, *supra*. See, generally, *Evans ex rel. Kutch v. State*, *supra*. Instead, the trial court applies the remedy's limitation only after the jury has fulfilled its factfinding function. See, e.g., *Murphy v. Edmonds*, *supra*; *Etheridge v. Medical Center Hospitals*, *supra*. See, generally, *Evans ex rel. Kutch v. State*, *supra*.

[57] Further, as we have discussed, the Legislature has the right to completely abolish a common-law cause of action. *Peterson v. Cisper*, 231 Neb. 450, 436 N.W.2d 533 (1989). If the Legislature has the constitutional power to abolish a cause of action, it also has the power to limit recovery in a cause of action. See, e.g., *Adams v. Children's Mercy Hosp.*, *supra*. We conclude that § 44-2825 does not violate the right to a jury trial.

(f) Taking of Property

The Gourleys next contend that the cap acts to take property in violation of Neb. Const. art. I, § 21. They argue that a cause of action and a jury's determination of damages are property.

Article I, § 21, states: "The property of no person shall be taken or damaged for public use without just compensation therefor." Article I, § 21, applies to vested property rights. See *Tracy v. City of Deshler*, 253 Neb. 170, 568 N.W.2d 903 (1997).

[58] As previously discussed, we have held that a person has no property and no vested interest in any rule of the common law or a vested right in any particular remedy. *Peterson v. Cisper*, *supra*. Further, courts have rejected the argument that a cause of action and determination of damages are property. *Pulliam v. Coastal Emergency Services*, 257 Va. 1, 509 S.E.2d 307 (1999). See, generally, *Evans ex rel. Kutch v. State*, 56 P.3d 1046 (Alaska 2002). The cap on damages in § 44-2825 does not violate Neb. Const. art. I, § 21. We conclude that the Gourleys' argument is without merit.

(g) Separation of Powers

The Gourleys contend that § 44-2825 violates the separation of powers provision of Neb. Const. art. II, § 1. They argue that the cap legislatively transfers their property to another, acts as a legislative remittitur, and acts as a legislative judgment on damages.

We have already stated that a person has no property and no vested interest in any rule of the common law or a vested right in any particular remedy. *Peterson v. Cisper*, *supra*. The Gourleys' argument about the legislative transfer of property is without merit. We also find no merit in the argument that the cap acts as a legislative judgment of damages. As we have discussed, the Legislature may abolish a common-law right or remedy. *Id.* For the same reasons the cap does not violate the right to a jury trial, it also does not act as a legislative determination of the amount of damages in any specific case.

We note that one court has held that a cap on damages improperly delegates to the Legislature the power to remit verdicts and judgments. *Best v. Taylor Mach. Works*, 179 Ill. 2d 367, 689 N.E.2d 1057, 228 Ill. Dec. 636 (1997). See, also, *Sofie v. Fibreboard Corp.*, 112 Wash. 2d 636, 771 P.2d 711 (1989), *amended* 780 P.2d 260 (indicating in dicta that cap might violate separation of powers). In *Best*, the court concluded that the determination whether a verdict was excessive was a discretionary function of the trial court and that a cap on damages improperly delegated that function to the Legislature.

Other courts, however, have determined that a cap on damages does not violate principles of separation of powers. See, e.g., *Verba v. Ghaphery*, 210 W. Va. 30, 552 S.E.2d 406 (2001); *Kirkland v. Blaine County Medical Center*, 134 Idaho 464, 4 P.3d 1115 (2000); *Guzman v. St. Francis Hospital, Inc.*, 240 Wis. 2d 559, 623 N.W.2d 776 (Wis. App. 2000); *Etheridge v. Medical Center Hospitals*, 237 Va. 87, 376 S.E.2d 525 (1989). See, generally, *Evans ex rel. Kutch v. State*, 56 P.3d 1046 (Alaska 2002). Most of these courts have specifically disagreed with the reasoning that a cap acts as a legislative remittitur. *Verba v. Ghaphery*, *supra*; *Kirkland v. Blaine County Medical Center*, *supra*; *Guzman v. St. Francis Hospital, Inc.*, *supra*. See, generally, *Evans ex rel. Kutch v. State*, *supra*.

In *Kirkland*, the Idaho Supreme Court noted that nothing about the damages cap purported to limit the exercise of the judiciary's constitutional powers or jurisdiction. The court stated:

Rather, if anything, the statute is a limitation on the rights of plaintiffs, not the judiciary. Because it is properly within the power of the legislature to establish statutes of limitations, statutes of repose, create new causes of action, and otherwise modify the common law without violating separation of powers principles, it necessarily follows that the legislature also has the power to limit remedies available to plaintiffs without violating the separation of powers doctrine.

Kirkland v. Blaine County Medical Center, 134 Idaho at 471, 4 P.3d at 1122.

[59] We agree that the damages cap does not act as a legislative remittitur or otherwise violate principles of separation of powers. The cap does not ask the Legislature to review a specific dispute and determine the amount of damages. Instead—without regard to the facts of a particular case—the cap imposes a limit on recovery in all medical malpractice cases as a matter of legislative policy. We have stated repeatedly that the Legislature may change or abolish a cause of action. Thus, the ability to cap damages in a cause of action is a proper legislative function. See, *Verba v. Ghaphery*, *supra*; *Kirkland v. Blaine County Medical Center*, *supra*; *Etheridge v. Medical Center Hospitals*, *supra*. See, generally, *Evans ex rel. Kutch v. State*, *supra*. “Indeed, were a court to ignore the legislatively-determined remedy and enter an award in excess of the permitted amount, the court would invade the province of the legislature.” *Etheridge v. Medical Center Hospitals*, 237 Va. at 101, 376 S.E.2d at 532. We determine that the cap on damages does not violate art. II, § 1.

5. CROSS-APPEAL

The Gourleys purported to file a cross-appeal assigning that the district court erred when it overruled the motion for new trial regarding the directed verdict for Nebraska Methodist. Nebraska Methodist filed a motion to dismiss, contending that this court lacks jurisdiction over the appeal because it was not filed within 10 days of the overruling of the motion for new trial. The motion

was denied. Nebraska Methodist then filed a brief arguing that this court lacks jurisdiction over the cross-appeal and that the cross-appeal was not properly filed.

The Gourleys' brief states on the cover that it is the brief of appellees and cross-appellants. An assignment of error appears on page 2 of the brief. Statements about jurisdiction, scope of review, and propositions of law are covered together for both the brief and any cross-appeal. The brief does not set out a separately designated section of the brief as the brief on cross-appeal. Instead, portions of the purported cross-appeal are scattered throughout the brief.

Neb. Ct. R. of Prac. 9D(4) (rev. 2000) provides:

Where the brief of appellee presents a cross-appeal, it shall be noted on the cover of the brief and it shall be set forth in a separate division of the brief. This division shall be headed "Brief on Cross-Appeal" and shall be prepared in the same manner and under the same rules as the brief of appellant.

[60] The appellate courts of this state have repeatedly held that a cross-appeal must be properly designated under rule 9D(4) if affirmative relief is to be obtained. *Michael B. v. Donna M.*, 11 Neb. App. 346, 652 N.W.2d 618 (2002). See *Schindler v. Walker*, 256 Neb. 767, 592 N.W.2d 912 (1999).

The Gourleys admit that they "did not comply with most of the procedural requirements of [rule] 9D(4)." Reply brief for appellees the Gourleys at 8. They ask that this court exercise discretion and consider the cross-appeal although rule 9D(4) was not followed. We decline to do so.

VI. CONCLUSION

We reverse that portion of the district court's judgment finding that § 44-2825(1) is unconstitutional and affirm the judgment in all other respects. The district court shall enter judgment for the Gourleys in the amount of \$1,250,000.

AFFIRMED IN PART, AND IN PART REVERSED.

STEPHAN and MILLER-LERMAN, JJ., not participating.

CONNOLLY, J., concurring.

I agree with and join the majority opinion but write separately to address several issues raised by Justice McCormack's dissent.

After foraging for facts outside the record, Justice McCormack concludes in his dissent that the reason for the damages cap—availability of malpractice insurance at reasonable rates—no longer exists. The dissenting opinion states that “[n]ow, 27 years after enactment of the cap, the information available indicates otherwise.” Citing from the Trends in 2002 Rates for Physicians’ Medical Professional Liability Insurance (Med. Liab. Monitor 2002), the dissent concludes that the Nebraska Hospital-Medical Liability Act has not served to reduce the cost of medical malpractice insurance. But the dissent fails to provide all the data from the report. It also fails to note that while the cost of insurance has generally risen in all or most states, the overall cost of insurance in Nebraska is significantly less than it is in many states that do not have caps on damages. Thus, the data that the dissent uses can also support the argument that the cap has been effective in keeping the overall rate of insurance lower in Nebraska than in many other states.

Justice McCormack’s dissent next refers to physicians’ incomes, apparently for the proposition that because physicians earn substantial incomes, they can afford insurance. This misses the point. The Legislature was concerned when enacting the cap that physicians were leaving the medical practice or moving to states with a better malpractice climate because of the costs of insurance. A second concern was that as insurance prices rose, physicians would pass those costs on to their patients, resulting in more expensive health care. A physician’s income is irrelevant to these problems. Physicians, like those in any other profession, seek to maximize income and thus will seek to practice in states where they have less overhead expenses and will pass any increase in overhead expenses on to their patients.

Although I find Justice McCormack’s conclusions based on his statistical sources suspect, what is more inappropriate is that they are used at all. As the majority opinion stated, it is not the place of a court to second guess the wisdom of legislative acts, nor is it appropriate for a court to decide whether legislation continues to meet the purposes for which it was originally enacted. See *Verba v. Ghaphery*, 210 W. Va. 30, 552 S.E.2d 406 (2001). See, also, *State v. Hunt*, 220 Neb. 707, 371 N.W.2d 708 (1985), *disapproved on other grounds*, *State v. Palmer*, 224 Neb. 282,

399 N.W.2d 706 (1986); *Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977). Of further concern is that the sources used in the dissent were not before the Legislature and are not in the record. Instead, if the evidence from the record were considered, the Gourleys presented little credible evidence that the cap was unwise or no longer necessary, while Knolla and the OB/GYN Group presented much more evidence supporting the cap.

Because the record and the dissent's use of statistics can be used to indicate differing points of view, one is left questioning which view is correct. What is clear is that a decision about the necessity of a damages cap cannot be decided based on a few incomplete sources. Instead, many differing sources must be considered. See, e.g., H.R. Rep. No. 108-32(I) (House Report from Committee on the Judiciary recommending enactment of damages cap and citing to numerous sources of information both in support of and in opposition to bill). The consideration of statistical sources to determine the wisdom of an act is the concern of the Legislature, not an appellate court. Were this court to start second guessing legislative enactments, principles of fairness and due process would require us to consider many sources of statistical information and hear from experts in the field. This court does not have the time or resources to engage in such a process, nor should we. That is not a judicial function. It is a legislative function that was carried out by the Legislature when it enacted Neb. Rev. Stat. § 44-2825 (Reissue 1998). The determination whether it is wise to continue the cap is also a legislative function.

This court's function is to neutrally review the constitutionality of legislation. It should not act as a second legislative chamber that can overturn legislation that it disagrees with. Although I am not entirely in agreement with the provisions of § 44-2825, this court is limited to reviewing the constitutionality of the act without engaging in a form of judicial legislation. Despite any personal concerns I have about the act, I conclude that it is constitutional.

Justice McCormack's dissent also suggests that this court's decision in *Prendergast*, *supra*, is not binding or persuasive authority. In *Prendergast*, three justices determined that portions of the Nebraska Hospital-Medical Liability Act were constitutional. Neb. Const. art. V, § 2, provides:

The Supreme Court shall consist of seven judges A majority of the judges shall be necessary to constitute a quorum. A majority of the members sitting shall have authority to pronounce a decision except in cases involving the constitutionality of an act of the Legislature. No legislative act shall be held unconstitutional except by the concurrence of five judges.

Thus, three is the constitutionally appropriate number of judges necessary to agree that a legislative act is constitutional. Because three justices in *Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977), held that portions of the act are constitutional, *Prendergast* is binding precedent. Also, as the majority opinion notes, we have consistently relied on *Prendergast* for the position that substantial reasons exist for legislative discrimination concerning malpractice actions. See *Haman v. Marsh*, 237 Neb. 699, 467 N.W.2d 836 (1991).

Moreover, a reading of the majority opinion makes clear that although the majority cited *Prendergast*, it also decided the issue after a thorough analysis regardless of *Prendergast*. Based on the authority cited by the majority, I would determine that the cap on damages in § 44-2825 is constitutional even if *Prendergast* had never been decided.

Next, relying largely on equal protection cases, the dissent would apply to a special legislation analysis a level of scrutiny comparable to the intermediate scrutiny test employed in an equal protection analysis. This is incorrect because, as the majority opinion states, the special legislation test is not a heightened test. Instead, it is simply a different test from that of equal protection. The rule advocated by the dissent introduces principles of equal protection into a special legislation analysis. Under the dissent's rule, legislation that was subject to a rational basis review under equal protection would always receive heightened scrutiny under a special legislation analysis. The effect would be a back door way of using an equal protection analysis to find legislation that passes muster under equal protection to be unconstitutional. A special legislation analysis has a different focus from an equal protection analysis and should not be used as a second equal protection clause under which everyone gets heightened scrutiny.

GERRARD, J., concurring.

In 1976, a precipitous process in the final stage of legislation led to the enactment of the Nebraska Hospital-Medical Liability Act. The act in significant instances unfairly deprives the Gourleys of the full measure of *economic damages* that is the most fundamental element of a meaningful recovery for negligently injured people. In a number of cases, people injured through no fault of their own will be unable to even collect their proven medical expenses. While I reluctantly concur with the per curiam opinion's conclusion that the act does not violate any of the provisions of the Nebraska Constitution that have been raised, briefed, and argued in this case, it would be injudicious to sit idly by and silently concur in a matter of such importance to so many parties. I, therefore, write separately to express my serious concerns about the public policy upon which the act is purportedly based and whether the act adequately protects the substantive due process rights of injured persons.

ECONOMIC AND NONECONOMIC DAMAGES

The Nebraska Hospital-Medical Liability Act, Neb. Rev. Stat. § 44-2801 et seq. (Reissue 1998), limits an injured person to a total recovery of \$1,250,000 for any single occurrence of medical professional malpractice. See § 44-2825(1). This limitation on total recovery ignores the distinctions to be made between different measures of damages and, as in the present case, can result in the inability of injured persons to recover even the expenses for their medical care. This unwarranted restriction on economic damages is, in my view, a fundamental flaw.

There are two separate types of compensatory damages, economic and noneconomic. Economic damages include the cost of medical care, past and future, and related benefits, i.e., lost wages, loss of earning capacity, and other such losses. Noneconomic losses include claims for pain and suffering, mental anguish, injury and disfigurement not affecting earning capacity, and losses which cannot be easily expressed in dollars and cents. See *McKissick v. Frye*, 255 Kan. 566, 876 P.2d 1371 (1994). See, also, *Gallion v. O'Connor*, 242 Neb. 259, 494 N.W.2d 532 (1993); Neb. Rev. Stat. § 25-21,185.08 (Reissue 1995). While both economic and noneconomic damages are intended to compensate plaintiffs

for their injuries, they do so in fundamentally different ways. Money damages are, at best, an imperfect means of compensating plaintiffs for intangible injuries. The effects of economic losses, on the other hand, can be fully ameliorated by the payment of money damages.

In other words, while the legal system cannot undo pain and suffering, it can and should provide that medical expenses be fully paid.

“When liability has been demonstrated, the first priority of the tort system is to compensate the injured party for the economic loss he has suffered. . . . [I]t is unconscionable to preclude a plaintiff, by an arbitrary ceiling on recovery, from recovering all his economic damages, even though some lowering of medical malpractice premiums may result from the enactment of such a ceiling.”

Fein v. Permanente Medical Group, 38 Cal. 3d 137, 160 n.17, 695 P.2d 665, 681 n.17, 211 Cal. Rptr. 368, 384 n.17 (1985) (quoting “Rep. of Com. on Medical Professional Liability (1977) 102 ABA Ann.Rep. 786, 849”).

Noneconomic damages are generally the largest portion of a medical liability settlement. Grace Vandecruze, *Has the Tide Begun to Turn for Medical Malpractice?*, 15 No. 2 Health Law. 15 (2002). More significantly, unbridled noneconomic damages have been said to present the primary threat to maintaining reasonable malpractice premiums, because such awards are based on highly subjective perceptions and resist actuarial prediction. See *Matter of Certif. of Questions of Law*, 544 N.W.2d 183 (S.D. 1996). See, also, *Franklin v. Mazda Motor Corp.*, 704 F. Supp. 1325 (D. Md. 1989); *Murphy v. Edmonds*, 325 Md. 342, 601 A.2d 102 (1992); *Fein*, *supra*. See, generally, Mark C. Kendall, *Expectations, Imperfect Markets, and Medical Malpractice Insurance*, in *The Economics of Medical Malpractice* 167 (Simon Rottenberg ed., 1978); Judith K. Mann, *Factors Affecting the Supply Price of Malpractice Insurance*, in *The Economics of Medical Malpractice* 155 (Simon Rottenberg ed., 1978).

Recognizing these basic principles, the substantial majority of states that have enacted limitations on medical malpractice damages have limited noneconomic damages, but allowed complete recovery for economic losses. See, generally, 2 David W. Louisell

and Harold Williams, *Medical Malpractice* ¶ 18.26 (2002); Miles J. Zaremski and Frank D. Heckman, *Reengineering Healthcare Liability Litigation*, ch. 11 (1997 & Cum. Supp. 1999) (compiling state statutory provisions). Similarly, several courts upholding the constitutional validity of such limitations have, in so doing, noted the distinction between economic and noneconomic damages. See, *Franklin*, *supra*; *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898 (Mo. 1992) (en banc); *Fein*, *supra*; *Edmonds v. Murphy*, 83 Md. App. 133, 573 A.2d 853 (1990), *affirmed* 325 Md. 342, 601 A.2d 102 (1992) (upholding statutes that permitted complete recovery of economic damages). Compare *Matter of Certif. of Questions of Law*, *supra* (striking down cap because of limitation on recovery for economic damages).

LEGISLATIVE PROCESS

The legislative history of the Nebraska Hospital-Medical Liability Act reflects awareness of the need to protect recovery for economic losses, but also reflects a legislative process that short circuited attempts to address that need. The parameters of what would become the act were first set forth in L.B. 703, 84th Legislature, 2d Session. As originally drafted, L.B. 703 would have capped total recovery, much like the present act, at \$500,000. Testimony was heard by the Public Health and Welfare Committee reflecting the policy concerns set forth above, and it was decided to amend L.B. 703 to address those concerns. As amended by the committee, L.B. 703 would have capped general damages at \$500,000, but placed no limitation on special damages. See *Legislative Journal*, 84th Leg., 2d Sess. 796 (Feb. 26, 1976).

However, L.B. 703, as amended, was held up on the floor of the Legislature. Instead, the general provisions of the original version of L.B. 703, prior to the committee amendment, were amended into a bill that had originally dealt with meat retailers. See *Legislative Journal*, L.B. 434, 84th Leg., 2d Sess. 1240 (Mar. 19, 1976). L.B. 434 was enacted by the Legislature. See 1976 Neb. Laws, L.B. 434. Because of the circuitous process by which the act became law, there is little evidence that the specific decision to cap both economic and noneconomic damages was fully considered by the Legislature. The members of the

Public Health and Welfare Committee were the only senators with the opportunity to hear and examine the witnesses who testified regarding the act. But the committee's determination to at least allow complete recovery for special damages, based on that testimony, was undone on the floor of the Legislature by parliamentary maneuvering.

EXCESS LIABILITY FUND

Moreover, there is little suggestion that the Legislature fully considered how the different aspects of the act would interact. The primary concern of the Legislature seems to have been the problem of increasing malpractice insurance premiums, and it is evident that the cap on total damages was intended to reduce those premiums. However, an examination of the statutory scheme demonstrates that there is no significant relationship between the cap on total recovery and malpractice insurance premiums, because of the intervening effect of the Excess Liability Fund.

Under the act, a qualified health care provider shall not be liable to any patient for an amount in excess of \$200,000 arising from any occurrence. See § 44-2825(2). Instead, subject to the overall limit established by § 44-2825(1), any amount due from a judgment in excess of the total liability of all liable health care providers shall be paid from the Excess Liability Fund. See § 44-2825(3). Health care providers are required to maintain professional liability insurance in the amount of \$200,000 per occurrence. See § 44-2827. See, generally, *Brewington v. Rickard*, 235 Neb. 843, 457 N.W.2d 814 (1990).

To compensate for judgments above \$200,000 per qualified health care provider, but below the cap on total recovery, the act creates the Excess Liability Fund (hereinafter the Fund), which is supported by a surcharge levied on all qualified health care providers. See § 44-2829. The amount of the surcharge is established by the Director of Insurance and is intended to maintain a reserve in the Fund "sufficient to pay all anticipated claims for the next year and to maintain an adequate reserve for future claims." See § 44-2830. However, the surcharge is not to exceed 50 percent of the annual premium paid by health care providers for their required malpractice insurance, except that a special surcharge may be levied if the amount in the Fund is inadequate

to pay all claims for a calendar year. See §§ 44-2829(2)(a) and 44-2831(1). The director may also obtain reinsurance for the Fund. See § 44-2831(2).

The effect of this scheme is to attenuate, if not almost completely sever, the relationship between the cap on total recovery and malpractice insurance premiums. Malpractice insurance premiums are established based on actuarial principles which generally evaluate, inter alia, the risk of liability and the predicted value of successful claims. See, generally, Judith K. Mann, *Factors Affecting the Supply Price of Malpractice Insurance*, in *The Economics of Medical Malpractice* 155 (Simon Rottenberg ed., 1978). Because of the Fund, however, the exposure of malpractice insurance carriers is limited to \$200,000 arising out of any single occurrence for any single care provider. It is that figure, and not the cap on total liability, which must provide the primary basis for actuarial determinations of malpractice insurance premiums.

The cap on total recovery, then, has some, but minimal, bearing on the market cost of medical malpractice insurance. The cap on total recovery does not serve to limit the liability of malpractice insurers; instead, it limits the liability of the Fund. Unfortunately, the Legislature, in enacting the act, does not seem to have reflected on whether each of the specific provisions of the act were necessary or warranted in light of the remaining provisions. When considering the public policy rationale for the cap on total liability—and, more particularly, the cap on economic damages—the question is, To what extent can a limitation on recovery for proven economic losses be justified by a need to limit the potential liability of the Fund?

SUBSTANTIVE DUE PROCESS

In my view, this question, when placed in its proper constitutional framework, implicates the constitutional right to substantive due process of law. There is a substantial overlap between the tests applied under due process and equal protection analysis. See, generally, *Condemarin v. University Hosp.*, 775 P.2d 348 (Utah 1989). The distinction is that equal protection and special legislation analyses are focused on the classes created by a statute and whether there is justification for making such classifications and treating those classes differently. See, e.g., *Bergan*

Mercy Health Sys. v. Haven, 260 Neb. 846, 620 N.W.2d 339 (2000). Due process, on the other hand, questions the justification for abrogating a particular legal right, and the appropriate scrutiny is determined by the importance of the right that is at issue. See, generally, *Condemarin*, *supra*. Thus, while the act does not create suspect classifications, and there may be some rational basis for treating health care tort-feasors differently from other tort-feasors, whether economic damages may be taken from negligently injured persons is a separate issue and calls for a different constitutional analysis. Because my concerns regard the nature of the basic right that has been taken—the right to recover for proven economic damages—those concerns are properly addressed by a due process analysis.

However, as the per curiam opinion correctly determines, the issue of substantive due process has not been brought before this court, and we are precluded from deciding, on the record and briefing before us, whether the act comports with that constitutional mandate. Nonetheless, my judicial responsibilities compel me to express my serious reservations regarding the act's satisfaction of constitutional due process, for the benefit of other litigants, the members of the Legislature, and their constituents, the public.

The Nebraska Constitution provides that “[n]o person shall be deprived of life, liberty, or property, without due process of law” Neb. Const. art. I, § 3. The concept of due process embodies the notion of fundamental fairness and defies precise definition. *Marshall v. Wimes*, 261 Neb. 846, 626 N.W.2d 229 (2001). The primary purpose of that constitutional guaranty is security of the individual from the arbitrary exercise of the powers of government. *Rein v. Johnson*, 149 Neb. 67, 30 N.W.2d 548 (1947). The Legislature may not, under the guise of regulation, set forth conditions which are unreasonable, arbitrary, discriminatory, or confiscatory. *State ex rel. Dept. of Health v. Jeffrey*, 247 Neb. 100, 525 N.W.2d 193 (1994).

Generally, classifications appearing in social or economic legislation require only a rational relationship between the state's legitimate interest and the means selected to accomplish that end. The ends-means fit need not be perfect; it need only be rational. *State v. Champoux*, 252 Neb. 769, 566 N.W.2d 763 (1997).

Accord *Robotham v. State*, 241 Neb. 379, 488 N.W.2d 533 (1992). But measures adopted by the Legislature to protect the public health and secure the public safety and welfare must still have some reasonable relation to those proposed ends. See, *Jeffrey, supra*; *Finocchiaro, Inc. v. Nebraska Liq. Cont. Comm.*, 217 Neb. 487, 351 N.W.2d 701 (1984). See, also, *Rein, supra*. There must be some clear and real connection between the assumed purpose of the law and its actual provisions. *Finocchiaro, Inc., supra*.

When a fundamental right or suspect classification is not involved in legislation, the legislative act is a valid exercise of the police power if the act is rationally related to a legitimate state interest. *Champoux, supra*. However, this begs the question whether the right to recover for economic losses is important enough to merit heightened scrutiny under the Nebraska Constitution. Although this court, because of the limitation on the issues presented, has no occasion in this case to determine the appropriate level of scrutiny to be applied in a due process analysis of a cap on economic damages, it is worth noting that several courts have concluded the right to recover damages for personal injury is essential, and caps on damages are subject to heightened judicial scrutiny in making constitutional determinations. See, e.g., *Matter of Certif. of Questions of Law*, 544 N.W.2d 183 (S.D. 1996); *Condemarin v. University Hosp.*, 775 P.2d 348 (Utah 1989); *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980); *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978); *Jones v. State Board of Medicine*, 97 Idaho 859, 555 P.2d 399 (1976). As explained by the Supreme Court of South Dakota:

Medical bills, lost wages, and prescription costs are tangible damages, whereas pain and suffering and like damages are largely intangible. Unbridled noneconomic damage awards present a real threat to maintaining reasonable malpractice insurance premiums, because such awards are unpredictable and based on highly subjective perceptions. . . . In truth, however, the . . . flat cap on total damages potentially cuts not only fat, but muscle, bone and marrow. If a malpractice patient's hospital bill, for example, exceeds the cap, then the patient can recover nothing for the remaining medical bills, future bills, past and future income lost, prescriptions, etc.

Matter of Certif. of Questions of Law, 544 N.W.2d at 200. The right to such recovery “‘is a substantial property right, not only of monetary value but in many cases fundamental to the injured person’s physical well-being and ability to continue to live a decent life.’” *Condemarin*, 775 P.2d at 360, quoting *Hunter v. North Mason School Dist.*, 85 Wash. 2d 810, 539 P.2d 845 (1975).

The facts of the instant case demonstrate the callous effect of denying recovery for economic damages. The record shows that Colin suffered severe brain damage and will, for the rest of his life, be afflicted by cerebral palsy and extensive physical, cognitive, and behavioral deficiencies. The economic evidence presented by the Gourleys sets forth the expenses likely to be incurred over the course of Colin’s life because of his disabilities, including medications, care, and medical treatment and equipment. The Gourleys’ expert testified, without contradiction, that the expenses for Colin’s care will total \$12,461,500.22 over the course of his life. This figure has a present value of \$5,943,111, of which the jury awarded \$5 million. In short, it is undisputed that the Gourleys will recover, because of § 44-2825(1), less than one-fourth of Colin’s medical expenses alone.

This effect on the quality of life of an injured child, incurred because of a statutory limitation on the right to collect economic damages, must be balanced against the act’s only direct effect: the maintenance of the Fund. The evidence in this case does not indicate that the Fund requires financial protection. In fact, the evidence is far to the contrary. In 1998, the surcharge for qualified health care providers was 5 percent. The balance in the Fund at the end of 1998 was \$62,625,074, and the estimated liabilities of (i.e., potential claims against) the Fund at that time were \$24,014,000. Between 1990 and 1998, the amount of total claims paid in any given year ranged from a low of \$1,795,069 in 1990 to a high of \$4,197,308 in 1991. In 1998, the Fund *earned* over three times more than it paid out in claims, even disregarding the additional funds obtained through the surcharge (which, it should be noted, was only one-tenth of the surcharge permitted under the act).

Given the stark comparison between the assets of the Fund and the potential poverty that can result from forcing negligently injured persons to find their own means of paying for catastrophic

medical expenses, it may ultimately be determined that the act, in capping recovery for economic damages, is unconstitutional as applied to plaintiffs whose proven economic damages exceed the cap. This would not render the act completely inoperative, but would preclude application of the cap where it would prevent a complete recovery of economic damages. See, generally, *Olmer v. City of Lincoln*, 23 F. Supp. 2d 1091 (D. Neb. 1998), *affirmed* 192 F.3d 1176 (8th Cir. 1999); *Texas Workers' Compensation Com'n v. Garcia*, 893 S.W.2d 504 (Tex. 1995); *Whitehead Oil Co. v. City of Lincoln*, 245 Neb. 680, 515 N.W.2d 401 (1994) (distinguishing between facial challenge to statute, which asserts statute unconstitutional under all circumstances, and as-applied challenge, which asserts statute operates unconstitutionally because of party's unique circumstances).

I recognize the general principle that the wisdom and utility of legislation is a matter for the Legislature, and not the courts, and that judges should not substitute their social and economic beliefs for the judgment of legislative bodies. See, *City of Grand Island v. County of Hall*, 196 Neb. 282, 242 N.W.2d 858 (1976); *Major Liquors, Inc. v. City of Omaha*, 188 Neb. 628, 198 N.W.2d 483 (1972). See, also, e.g., *Ferguson v. Skrupa*, 372 U.S. 726, 83 S. Ct. 1028, 10 L. Ed. 2d 93 (1963); *Okl. Ed. Ass'n v. Alcoholic Bev. Laws Enf. Com'n*, 889 F.2d 929 (10th Cir. 1989). However, the discretion of the Legislature is circumscribed, as always, by the Nebraska Constitution, particularly where the abrogation of fundamental rights is concerned. The effect of the act on a substantial right—recovery of economic damages—is especially troubling, and potentially unreasonable, when balanced against the negligible effect that such recovery would have on the Fund.

The parties in this case have not presented the question whether the act, as applied, violates substantive due process, and I agree with the per curiam opinion's determination that we should not overthrow a legislative enactment on the basis of authority not raised and argued by the parties. The per curiam opinion expressly reserves ruling on such issues, which means that some of the most important questions about the act remain, for the time being, unanswered. This does not, however, prevent the Legislature from considering whether the act, in its current form, is fair, wise, or necessary, nor should it preclude legislative

changes to protect both the constitutional validity of the act and the well-being of the citizens of Nebraska.

CONCLUSION

As previously stated, I concur, albeit grudgingly, in the per curiam opinion's conclusions regarding the constitutional challenges to the act. I join in the opinion of the court regarding the other issues presented. I remain deeply troubled by the public policy choices reflected in the act, particularly the denial of economic recovery to negligently injured persons. It is pointedly unfair, and may well prove unconstitutional, for the law of this state to safeguard a surplus of tens of millions of dollars in the Excess Liability Fund by denying negligently injured persons money for needed medical care and potentially condemning them to undue poverty. But, because this case does not afford us the opportunity to decide that constitutional question, I reluctantly concur in the judgment of the court.

HENDRY, C.J., joins in this concurrence.

HENDRY, C.J., concurring in part, and in part dissenting.

I concur with Justice Gerrard insofar as he suggests that the cap on damages imposed by Neb. Rev. Stat. § 44-2825(1) (Reissue 1998) may violate substantive due process rights of injured persons. I write separately, however, to state that for reasons similar to those expressed in my dissent in *Bergan Mercy Health Sys. v. Haven*, 260 Neb. 846, 620 N.W.2d 339 (2000) (Hendry, C.J., dissenting), I believe the Gourleys lack standing to challenge the Nebraska Hospital-Medical Liability Act as unconstitutional special legislation in violation of Neb. Const. art. III, § 18.

In assessing a special legislation claim, we must first determine the privilege created by the statute and the particular class which is singled out to receive the privilege. *Haven, supra*. See, also, *Swanson v. State*, 249 Neb. 466, 544 N.W.2d 333 (1996); *Stanton v. Mattson*, 175 Neb. 767, 123 N.W.2d 844 (1963). In my view, the privilege created by § 44-2825(1) is the cap on the total amount recoverable "from any and all health care providers . . . for any occurrence resulting in injury or death of a patient." The particular class singled out by the Legislature to receive the privilege is composed of "health care providers," which class is

limited to physicians, nurse anesthetists, qualifying professional entities, and hospitals. Neb. Rev. Stat. § 44-2803 (Reissue 1998).

Next, we must determine the persons within the general class which is made the subject of the legislation who stand in the same relation to the privilege as the particular class that receives the privilege. *Haven, supra*. See, also, *Swanson, supra*; *Stanton, supra*. Further, we must then determine whether the statute violates Neb. Const. art. III, § 18, either because the particular class which receives the privilege is a permanently closed class, or because the particular class has no reasonable distinction or substantial difference from the general class. *Haven, supra*. See, also, *Swanson, supra*; *Stanton, supra*.

I believe that the general class of persons standing in the same relation to the privilege would be all other health care professionals who are not "health care providers" as defined by the act, but who nonetheless may be liable "for bodily injury or death on account of alleged malpractice, professional negligence, failure to provide care, breach of contract, or other claim based upon failure to obtain informed consent for an operation or treatment." Neb. Rev. Stat. § 44-2822 (Reissue 1998). Such individuals could include, for example, optometrists (see Neb. Rev. Stat. § 71-1,135.06 (Cum. Supp. 2002)); dentists (see, generally, *Gordon v. Connell*, 249 Neb. 769, 545 N.W.2d 722 (1996), *Capps v. Manhart*, 236 Neb. 16, 458 N.W.2d 742 (1990), *DeCamp v. Lewis*, 231 Neb. 191, 435 N.W.2d 883 (1989), and *Pfeifer v. Konat*, 181 Neb. 30, 146 N.W.2d 743 (1966)); and chiropractors (see, generally, *Jones v. Malloy*, 226 Neb. 559, 412 N.W.2d 837 (1987)).

I therefore conclude that the only persons who would have standing to assert that § 44-2825(1) is unconstitutional special legislation are such members of the general class who do not benefit from the privilege of the cap on damages pursuant to § 44-2825(1). *Haven, supra*. See, also, *Swanson, supra*; *Stanton, supra*. Because in my view the Gourleys lack standing, I reserve judgment as to whether § 44-2825(1) violates Neb. Const. art. III, § 18, until the proper party, together with an adequate and proper record, is before the court.

Recognizing that courts are concerned only with the power of the legislative branch to enact statutes, and not a legislature's

wisdom, with the exception of its analysis regarding special legislation, I concur with the per curiam opinion. See, *U.S.D. No. 229 v. State*, 256 Kan. 232, 238, 885 P.2d 1170, 1175 (1994) (stating that “‘the function of the court is merely to ascertain and declare whether legislation was enacted in accordance with or in contravention of the constitution—and not to approve or condemn the underlying policy,’” quoting *Samsel v. Wheeler Transport Services, Inc.*, 246 Kan. 336, 789 P.2d 541 (1990)); *Fagas v. Scott*, 251 N.J. Super. 169, 211, 597 A.2d 571, 593 (1991) (stating that “‘judicial branch of the government does not and cannot concern itself with the wisdom or policy of a statute [and that s]uch matters are the exclusive concern of the legislative branch, and the doctrine is firmly settled that its enactment may not be stricken because a court thinks it unwise,’” quoting *N. J. Sports & Exposition Authority v. Mc Crane*, 61 N.J. 1, 292 A.2d 545 (1972)).

McCORMACK, J., concurring in part, and in part dissenting.

I agree with those portions of this court’s per curiam opinion discussing the jury verdict, the life care plan, “What to Expect When You’re Expecting,” and the Gourleys’ attempted cross-appeal. However, I respectfully dissent from the per curiam opinion’s analysis of the constitutionality of Neb. Rev. Stat. § 44-2825(1) (Reissue 1998) (the cap). I would find that the cap is special legislation in violation of Neb. Const. art. III, § 18.

PRENDERGAST V. NELSON

As recognized by the per curiam opinion, this court previously addressed the constitutionality of various provisions of the Nebraska Hospital-Medical Liability Act in *Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977). I respectfully suggest that *Prendergast* is persuasive authority for next to nothing.

In *Prendergast*, a declaratory judgment action was brought by three health care providers against the director of the Nebraska Department of Insurance after the director refused to implement the provisions of the act. A three-judge plurality of this court upheld the constitutionality of numerous provisions of the act. Specifically, the plurality found that the cap was not an unconstitutional special privilege. *Prendergast v. Nelson, supra*. The plurality found it important that while a claimant who has not elected

out of the act's provisions may be limited in the amount of recovery, the claimant is guaranteed the existence of a fund from which to recover and is also guaranteed a procedure to provide an assessment of his or her claim. *Prendergast v. Nelson, supra*. The ability to elect out of the act's provisions and the tradeoff of the amount of recovery for the assessment and certainty of recovery persuaded the plurality that the cap did not offend any constitutional prohibition on the passage of special legislation.

The plurality opinion authored by Justice Spencer is one of six opinions filed in the case and is the *only* opinion in which any member of the court found that the cap is constitutional. A review of several of the remaining opinions discloses the dubious procedural posture upon which the plurality made its findings.

Justice Clinton concurred with the plurality with respect to "[t]he only justiciable issue before the court," i.e., whether the act granted the credit of the state in aid of an individual, association, or corporation under Neb. Const. art. XIII, § 3. *Prendergast v. Nelson*, 199 Neb. at 125, 256 N.W.2d at 674 (Clinton, J., concurring in part, and in part dissenting). As to the remaining issues, Justice Clinton admonished:

Today this court, to the best of my knowledge, for the first time in its history renders what is, for the most part, an advisory opinion. In this respect it lamentably disregards its constitutional functions as a court. This course, if followed in the future, has ominous implications for the future political welfare of this state.

Id. at 122, 256 N.W.2d at 672.

In addition to the suspect procedural posture of the case, *Prendergast* also resulted in a severely fractured court. While Justice Clinton declined to reach any constitutional issues not properly raised, Justice White found that the cap was unconstitutional special legislation. *Id.* (White, J., dissenting in part). Justice McCown concurred with Justice White's opinion that the cap was unconstitutional special legislation. *Id.* (McCown, J., dissenting in part). Finally, Justice Boslaugh found that the election provision of the act—the saving grace of the cap according to the plurality—was “unrealistic and illusory.” *Prendergast v. Nelson*, 199 Neb. 97, 133, 256 N.W.2d 657, 677 (1977) (Boslaugh, J., dissenting in part).

The fractures and procedural defects in *Prendergast* noted above have not gone unnoticed by other states. The North Dakota Supreme Court has noted that *Prendergast*

is made less persuasive by the fact that the majority opinion is joined by only three of seven judges, with three others dissenting as to the constitutionality of a \$500,000 limitation on recovery, and one judge declining to reach constitutional questions, since he questions the standing of some of the parties and concludes that the opinion is only advisory.

Arneson v. Olson, 270 N.W.2d 125, 131 (N.D. 1978). See, also, *Lucas v. U.S.*, 757 S.W.2d 687 (Tex. 1988); *Fein v. Permanente Medical Group*, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368 (1985) (Bird, C.J., dissenting).

A court has the power neither to render advisory opinions nor to decide questions that cannot affect the rights of litigants in the case before it. *Preiser v. Newkirk*, 422 U.S. 395, 95 S. Ct. 2330, 45 L. Ed. 2d 272 (1975). The director of the Department of Insurance admittedly represented no person in *Prendergast* who was limited in the amount he or she could recover against a health care provider or whose constitutional rights were otherwise affected by the provisions of the act. *Prendergast v. Nelson*, *supra* (Clinton, J., concurring in part, and in part dissenting). Despite the lack of a concrete adversarial claim, a plurality of the court ventured forth to address whether the cap, evidently as applied to some hypothetical claimant, was constitutional. The present case suffers from no such defect. For the first time, the constitutionality of the cap has been presented to this court by parties with their own rights at stake. The Gourleys were awarded damages against Knolla and the OB/GYN Group in an amount exceeding the cap and now seek a determination that the cap is unconstitutional so that they may recover the full amount of their damages. The rights of the Gourleys and of Knolla and the OB/GYN Group are squarely at issue in this case.

The doctrine of stare decisis would typically require us to abide by the *Prendergast* decision and uphold the constitutionality of the cap, see *Metro Renovation v. State*, 249 Neb. 337, 543 N.W.2d 715 (1996), “““‘unless the reasons therefor have ceased to exist, are clearly erroneous, or are manifestly wrong and mischievous or unless more harm than good will result from doing so,’”””

(emphasis in original) *State v. Reeves*, 258 Neb. 511, 527-28, 604 N.W.2d 151, 163 (2000). The U.S. Supreme Court describes stare decisis as a principle of policy rather than an inexorable command. *Hohn v. United States*, 524 U.S. 236, 118 S. Ct. 1969, 141 L. Ed. 2d 242 (1998). Where a fractured decision of this court rests upon tenuous procedural grounds, and where the current case presents clear adversaries serving to sharply focus the constitutional issues, I believe it would be a disservice to the parties to pronounce a decision based upon a case as ill-advised as *Prendergast*. Thus, I visit the issue anew.

SPECIAL LEGISLATION

Neb. Const. art. III, § 18, provides:

The Legislature shall not pass local or special laws in any of the following cases, that is to say:

.....

Granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever In all other cases where a general law can be made applicable, no special law shall be enacted.

By definition, a legislative act is general, and not special, if it operates alike on all persons of a class or on persons who are brought within the relations and circumstances provided for and if the classification so adopted by the Legislature has a basis in reason and is not purely arbitrary. *Haman v. Marsh*, 237 Neb. 699, 467 N.W.2d 836 (1991). A legislative act that applies only to particular individuals or things of a class is special legislation. *Id.* General laws embrace the whole of a subject, with their subject matter of common interest to the whole state. Uniformity is required in order to prevent granting to any person, or class of persons, the privileges or immunities which do not belong to all persons. *Id.* It is because the legislative process lacks the safeguards of due process and the tradition of impartiality which restrain the courts from using their powers to dispense special favors that such constitutional prohibitions against special legislation were enacted. *Id.*

A legislative act constitutes special legislation, violative of Neb. Const. art. III, § 18, if (1) it creates an arbitrary and unreasonable method of classification or (2) it creates a permanently

closed class. *Bergan Mercy Health Sys. v. Haven*, 260 Neb. 846, 620 N.W.2d 339 (2000). My focus is solely on whether the cap creates an arbitrary and unreasonable method of classification.

A legislative classification, in order to be valid, must be based upon some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified. *Id.* Classifications for the purpose of legislation must be real and not illusive; they cannot be based on distinctions without a substantial difference. *Id.* When the Legislature confers privileges on a class arbitrarily selected from a large number of persons standing in the same relation to the privileges, without reasonable distinction or substantial difference, then the statute in question has resulted in the kind of improper discrimination prohibited by the Nebraska Constitution. *Id.*

In *Haman v. Marsh*, 237 Neb. at 713, 467 N.W.2d at 846-47, we had the opportunity to describe this test in greater detail:

The narrower special legislation prohibition supplements the equal protection theory. . . . The test of validity under the special legislation prohibition is more stringent than the traditional rational basis test. Classifications must be based on some *substantial* difference of situation or circumstances that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified.

(Citation omitted.) (Emphasis in original.)

The above-quoted portion of *Haman* was necessary to resolve some confusion about the exact nature of the test and its relationship to the test applied in an equal protection case. The tests applied in an equal protection case are well known. If a statute involves economic or social legislation not implicating a fundamental right or suspect class, courts will ask only whether a rational relationship exists between a legitimate state interest and the statutory means selected by the Legislature to accomplish that end. *Schindler v. Department of Motor Vehicles*, 256 Neb. 782, 593 N.W.2d 295 (1999). The party challenging a statute's constitutionality has the burden to show that the statute has no rational basis. See *Hall v. Progress Pig, Inc.*, 259 Neb. 407, 610 N.W.2d 420 (2000). Upon a showing that such a rational relationship

exists, courts will uphold the legislation. *Schindler v. Department of Motor Vehicles*, *supra*. The intermediate scrutiny test requires that a party seeking to uphold a statute that classifies individuals must show that the classification serves important governmental objectives and that the discriminatory means employed are *substantially* related to achievement of those objectives. See *Mississippi University for Women v. Hogan*, 458 U.S. 718, 102 S. Ct. 3331, 73 L. Ed. 2d 1090 (1982). See, also, *Friehe v. Schaad*, 249 Neb. 825, 545 N.W.2d 740 (1996). Finally, if a legislative classification involves either a suspect class or a fundamental right, courts will analyze the statute with strict scrutiny. Under this test, strict congruence must exist between the classification and the statute's purpose. The end the Legislature seeks to effectuate must be a compelling state interest, and the means employed in the statute must be such that no less restrictive alternative exists. *Schindler v. Department of Motor Vehicles*, *supra*.

In *Haman v. Marsh*, 237 Neb. 699, 713, 467 N.W.2d 836, 846 (1991), we described special legislation as being a "narrower" test than equal protection. We further explained that "[t]he test of validity under the special legislation prohibition is *more stringent* than the traditional rational basis test." (Emphasis supplied.) *Id.* at 713, 467 N.W.2d at 846-47. See, also, *City of Ralston v. Balka*, 247 Neb. 773, 530 N.W.2d 594 (1995). The level of scrutiny required by the above-mentioned test is "more stringent" because of the requirement that classifications be based upon some "*substantial*" difference of situation or circumstances. (Emphasis in original.) *Haman v. Marsh*, 237 Neb. at 713, 467 N.W.2d at 847. See, also, *City of Ralston v. Balka*, *supra*; *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991) (emphasizing that classifications must be based upon some *substantial* difference of situation or circumstances); *State ex rel. Douglas v. Marsh*, 207 Neb. 598, 300 N.W.2d 181 (1980).

Because the test of validity under the special legislation prohibition is more stringent than the traditional rational basis test, I would apply a level of scrutiny comparable to the intermediate scrutiny test. It is well known that the degree of judicial scrutiny to which the statute is to be subjected may be dispositive. See *Schindler v. Department of Motor Vehicles*, *supra*.

That has proved to be the case in other states that have analyzed caps. Those states that have subjected caps to the minimal rational basis test have, as one might expect, found their caps to be constitutional. See, *Evans ex rel. Kutch v. State*, 56 P.3d 1046 (Alaska 2002); *Fein v. Permanente Medical Group*, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368 (1985); *Scholz v. Metropolitan Pathologists, P.C.*, 851 P.2d 901 (Colo. 1993) (en banc); *Leliefeld v. Johnson*, 104 Idaho 357, 659 P.2d 111 (1983); *Johnson v. St. Vincent's Hospital*, 273 Ind. 374, 404 N.E.2d 585 (1980), *abrogated on other grounds*, *Collins v. Day*, 644 N.E.2d 72 (Ind. 1994); *Murphy v. Edmonds*, 325 Md. 342, 601 A.2d 102 (1992); *Phillips v. Mirac, Inc.*, 251 Mich. App. 586, 651 N.W.2d 437 (2002); *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898 (Mo. 1992) (en banc); *Morris v. Savoy*, 61 Ohio St. 3d 684, 576 N.E.2d 765 (1991); *Matter of Certif. of Questions of Law*, 544 N.W.2d 183 (S.D. 1996); *Etheridge v. Medical Center Hospitals*, 237 Va. 87, 376 S.E.2d 525 (1989); *Robinson v. Charleston Area Med. Center*, 186 W. Va. 720, 414 S.E.2d 877 (1991); *Guzman v. St. Francis Hospital, Inc.*, 240 Wis. 2d 559, 623 N.W.2d 776 (Wis. App. 2000). However, caps have generally been unable to survive a more stringent level of scrutiny. See, *Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156 (Ala. 1991); *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978); *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980); *Condemarin v. University Hosp.*, 775 P.2d 348 (Utah 1989). But see *Jones v. State Board of Medicine*, 97 Idaho 859, 555 P.2d 399 (1976).

In analyzing a special legislation claim, we must determine (1) the privilege created by the statute, (2) the particular class which is singled out to receive the privilege, (3) the persons within the general class that is made the subject of the legislation who stand in the same relation to the privilege as the particular class, and (4) whether a substantial difference exists between the particular class and the general class. See *Bergan Mercy Health Sys. v. Haven*, 260 Neb. 846, 620 N.W.2d 339 (2000) (Hendry, C.J., dissenting).

The cap grants a privilege to all health care providers whose negligence causes catastrophic damages, i.e., damages in excess of \$1,250,000, because they are liable for less than 100 percent

of the damages they cause. The general class standing in the same relation to these health care providers is all other professional service providers who commit malpractice and cause catastrophic damages and who are liable for 100 percent of the damages they cause. Is there a substantial difference between these two classes? I do not believe that there is. Each class provides services to the public. Each class is subject to actions brought by the public for malpractice committed in the course of providing those services to the public. Each class is financially burdened by those actions which prove to be successful. Each class may impose the costs of those successful actions on the public at large. Yet the Legislature has chosen to provide a benefit to one subset of the general class by exempting those health care providers whose negligence causes damages in excess of \$1,250,000 from full liability for their negligent actions. Thus, I conclude that the cap is unconstitutional special legislation in violation of Neb. Const. art. III, § 18.

As Justice Gerrard discusses in greater detail, I am equally concerned by the fact that the cap applies to *all* damages, whether economic or noneconomic. Several states have struck down statutes that impose a cap on all damages. *Wright v. Central Du Page Hosp. Ass'n*, 63 Ill. 2d 313, 347 N.E.2d 736 (1976); *Arneson v. Olson*, *supra*; *State ex rel. OATL v. Sheward*, 86 Ohio St. 3d 451, 715 N.E.2d 1062 (1999); *Lucas v. U.S.*, 757 S.W.2d 687 (Tex. 1988). The majority of states with caps in effect today limit only the noneconomic damages a person may recover and do not limit recovery for economic damages. See Mark D. Clore, *Medical Malpractice Death Actions: Understanding Caps, Stowers, and Credits*, 41 S. Tex. L. Rev. 467, appendix A (2000). As the per curiam opinion notes, evidence offered at trial indicates that the Gourleys' economic damages, reduced to present value, is a minimum of \$5,943,111. The jury failed to award even this amount, instead awarding \$5 million in economic damages and \$625,000 in noneconomic damages. However, by applying the cap and slashing the Gourleys' award to \$1,250,000, the Gourleys receive an award which will cover only a fraction of their expenses over the course of Colin's lifetime and, in effect, receive nothing for their pain and suffering. See *Arneson v. Olson*, 270 N.W.2d 125 (N.D.

1978). If Nebraska followed the majority of states with caps that limited only noneconomic damages, the Gourleys would have been able to recover a large percentage of the expenses they will be burdened with for the rest of Colin's life. Had a valid challenge to the cap been preserved on substantive due process grounds, I would find that the cap violates that constitutional mandate as well for the reasons expressed by Justice Gerrard in his concurring opinion.

One of the stated purposes of the Nebraska Hospital-Medical Liability Act is to "[e]nsure the availability of malpractice insurance coverage at reasonable rates." Neb. Rev. Stat. § 44-2801(2) (Reissue 1998). As the per curiam opinion states, "the proponents of the act expressed concern that an insurance crisis existed, but admitted that it was likely impossible to know if a cap on damages would solve the problem. Based on the information before it, the Legislature generally believed that a damages cap would solve the problem" Now, 27 years after enactment of the cap, the information available indicates otherwise.

The following is a comparison of the base rates for physicians' liability insurance available in several states from various insurance companies for three different specialties: internal medicine, general surgery, and obstetrics-gynecology (OB/GYN). The data was obtained from Trends in 2002 Rates for Physicians' Medical Professional Liability Insurance (Med. Liab. Monitor 2002) (see, generally, <http://www.medicaliabilitymonitor.com>).

<u>STATE</u>	<u>2001 RATE</u>	<u>2002 RATE</u>	<u>% INCREASE SINCE 7/01</u>
NEBRASKA			
Midwest Medical Insurance Co.:			
Internal Medicine	\$ 3,183	\$ 3,469	9.0%
General Surgery	11,301	12,318	9.0
OB/GYN	17,297	18,854	9.0
PIC Wisconsin:			
Internal Medicine	\$ 2,256	\$ 2,786	23.4%
General Surgery	7,114	9,474	33.1
OB/GYN	12,288	16,718	36.0
CALIFORNIA			
Cooperative of American Physicians:			
Internal Medicine	\$ 7,710	\$ 9,070	17.6%
(So. Calif.)			

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Internal Medicine	7,340	8,630	17.6
	(San Diego)		
Internal Medicine	6,590	7,750	17.6
	(No. Calif.)		
General Surgery	24,740	25,330	2.4
	(So. Calif.)		
General Surgery	23,520	24,080	2.4
	(San Diego)		
General Surgery	21,070	21,570	2.4
	(No. Calif.)		
OB/GYN	42,330	43,350	2.4
	(So. Calif.)		
OB/GYN	40,230	41,200	2.4
	(San Diego)		
OB/GYN	36,020	36,890	2.4
	(No. Calif.)		

Northwest Physicians Mutual Insurance Co.:

Internal Medicine	\$ 9,204	\$ 9,810	6.6%
	(Los Angeles)		
Internal Medicine	7,592	8,092	6.6
	(San Diego)		
Internal Medicine	6,240	6,650	6.6
	(No. Calif. & rest of state)		
General Surgery	25,080	30,704	22.4
	(Los Angeles)		
General Surgery	20,879	24,073	15.3
	(San Diego)		
General Surgery	17,783	20,448	15.0
	(No. Calif. & rest of state)		
OB/GYN	46,938	56,406	20.1
	(Los Angeles)		
OB/GYN	38,721	43,776	13.1
	(San Diego)		
OB/GYN	33,226	37,238	12.1
	(No. Calif. & rest of state)		

COLORADO**COPIC Insurance Co.:**

Internal Medicine	\$ 9,324	\$ 9,845	5.6%
General Surgery	32,804	34,644	5.6
OB/GYN	29,265	30,905	5.6

Doctors' Co.:

Internal Medicine	\$ 8,482	\$ 8,876	14.8%
General Surgery	29,906	32,657	14.8
OB/GYN	38,578	39,494	14.8

FLORIDA**First Professionals Insurance Co.:**

Internal Medicine	\$ 38,378	\$ 56,153	46.3%
	(Dade Cty.)		
Internal Medicine	19,681	28,796	46.3
	(rest of state)		
General Surgery	124,046	174,268	40.5
	(Dade Cty.)		
General Surgery	63,614	89,368	40.5
	(rest of state)		
OB/GYN	166,368	201,376	21.0
	(Dade Cty.)		
OB/GYN	85,317	103,270	21.0
	(rest of state)		

Medical Assurance Co.:

Internal Medicine	\$ 17,611	\$ 26,794	52.1%
	(Dade, Broward Ctys.)		
Internal Medicine	10,232	15,460	51.1
	(rest of state)		
General Surgery	63,189	95,474	51.1
	(Dade, Broward Ctys.)		
General Surgery	36,277	54,677	50.7
	(rest of state)		
OB/GYN	108,043	136,231	26.1
	(Dade, Broward Ctys.)		
OB/GYN	61,908	77,949	25.9
	(rest of state)		

American Physicians Assurance Corp.:

Internal Medicine	\$ 30,272	\$ 49,494	63.5%
	(Dade Cty.)		
Internal Medicine	15,136	23,757	57.0
	(rest of state)		
General Surgery	75,164	117,201	55.9
	(Dade Cty.)		
General Surgery	37,582	56,256	49.7
	(rest of state)		
OB/GYN	159,166	210,576	32.3
	(Dade Cty.)		
OB/GYN	79,583	101,076	27.0
	(rest of state)		

IDAHO**Doctors' Co.:**

Internal Medicine	—	\$ 7,389	17.9%
General Surgery	—	27,546	17.9
OB/GYN	—	32,262	17.9

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Medical Insurance Exchange of California:

Internal Medicine	\$ 4,320	\$ 4,320	0.0%
General Surgery	15,544	15,544	0.0
OB/GYN	25,904	25,904	0.0

IOWA**American Physicians Assurance Corp.:**

Internal Medicine	\$ 4,374	\$ 4,374	0.0%
General Surgery	14,386	14,386	0.0
OB/GYN	27,839	27,839	0.0

Doctors' Co.:

Internal Medicine	—	\$ 9,169	29.1%
General Surgery	—	30,441	29.1
OB/GYN	—	39,852	29.1

Midwest Medical Insurance Co.:

Internal Medicine	\$ 5,412	\$ 6,168	14.0%
General Surgery	16,325	18,607	14.0
OB/GYN	33,237	37,883	14.0

KANSAS**Kansas Medical Mutual Insurance Co.:**

Internal Medicine	\$ 5,234	\$ 6,082	16.2%
General Surgery	21,343	24,801	16.2
OB/GYN	33,082	38,441	16.2

Medical Assurance Co.:

Internal Medicine	\$ 3,522	\$ 3,522	0.0%
General Surgery	14,090	14,090	0.0
OB/GYN	21,839	21,839	0.0

NORTH DAKOTA**Doctors' Co.:**

Internal Medicine	—	\$ 6,712	0.8%
General Surgery	—	18,006	0.8
OB/GYN	—	25,071	0.8

Midwest Medical Insurance Co.:

Internal Medicine	\$ 4,719	\$ 5,427	15.0%
General Surgery	12,583	14,470	15.0
OB/GYN	21,628	24,872	15.0

SOUTH DAKOTA**Doctors' Co.:**

Internal Medicine	—	\$ 5,395	19.7%
General Surgery	—	19,958	19.7
OB/GYN	—	23,950	19.7

Midwest Medical Insurance Co.:

Internal Medicine	\$ 2,527	\$ 2,906	15.0%
General Surgery	6,737	7,748	15.0
OB/GYN	11,580	13,317	15.0

The statistics cited above indicate a general upward trend in malpractice rates in Iowa and North Dakota—states that do not cap damages in medical malpractice actions. Belying the story line advanced by cap proponents, however, the same general upward trend is exhibited in states *with* caps, such as Nebraska, California, Colorado, Florida, Idaho, Kansas, and South Dakota. It appears that at least one of the intended goals of caps, to ensure reasonable malpractice rates, remains unmet—unfortunate news to the catastrophically injured such as Colin and his family, who can recover only approximately 20 percent of their medical costs so that some medical providers can enjoy what they consider to be reasonable rates. And while the absolute amount for malpractice insurance may, in some states, be burdensome, the data available suggests that insurance rates are not so “practically prohibitive,” as we stated in *Taylor v. Karrer*, 196 Neb. 581, 586, 244 N.W.2d 201, 204 (1976), *disapproved on other grounds*, *Jorgensen v. State Nat. Bank & Trust Co.*, 255 Neb. 241, 583 N.W.2d 331 (1998), relative to physicians’ incomes, as seen from the following data compiled by the American Medical Association:

GENERAL PRACTICE:

	<u>MEAN</u>	<u>MEDIAN</u>
Gross Revenue	\$457,800	\$369,000
Professional Expenses	263,000	184,000
Professional Liability	10,900	7,000
Income After All Expenses		
Including Malpractice Premiums	142,500	130,000

GENERAL INTERNAL MEDICINE:

	<u>MEAN</u>	<u>MEDIAN</u>
Gross Revenue	\$419,400	\$357,000
Professional Expenses	225,900	160,000
Professional Liability	10,800	6,000
Income After All Expenses		
Including Malpractice Premiums	157,900	140,000

INTERNAL MEDICINE-CARDIOLOGY:

	<u>MEAN</u>	<u>MEDIAN</u>
Gross Revenue	\$689,200	\$676,000
Professional Expenses	381,700	313,000

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Professional Liability	27,100	12,000
Income After All Expenses		
Including Malpractice Premiums	294,600	230,000

SURGERY-GENERAL:

	<u>MEAN</u>	<u>MEDIAN</u>
Gross Revenue	\$454,100	\$359,000
Professional Expenses	201,700	131,000
Professional Liability	24,900	23,000
Income After All Expenses		
Including Malpractice Premiums	246,800	215,000

SURGERY-ORTHOPEDIC:

	<u>MEAN</u>	<u>MEDIAN</u>
Gross Revenue	\$748,500	\$668,000
Professional Expenses	417,100	324,000
Professional Liability	34,200	28,000
Income After All Expenses		
Including Malpractice Premiums	312,500	280,000

OB/GYN:

	<u>MEAN</u>	<u>MEDIAN</u>
Gross Revenue	\$627,000	\$515,000
Professional Expenses	375,900	272,000
Professional Liability	35,800	33,000
Income After All Expenses		
Including Malpractice Premiums	214,400	200,000

Physician Socioeconomic Statistics 2000-2002 (John D. Wassenaar and Sara L. Thran, eds., Am. Med. Assn. 2001). While the income figures cited above are based on a nationwide sample of physicians, the study noted that “[g]eographic differences in income are less pronounced than for other” categories tabulated. James W. Moser, *Physician Income Trends*, in Physician Socioeconomic Statistics 2000-2002, *supra*.

I respectfully dissent from the per curiam opinion’s conclusion that the cap is constitutional.

CARLSON, Judge, concurring in part, and in part dissenting.

I join in Justice McCormack’s concurrence and dissent. I also agree with Justice Gerrard’s concurrence in regard to his substantive due process analysis.

DAN FOX, APPELLANT, v. BRADLEY E. NICK,
SPECIAL ADMINISTRATOR OF THE ESTATE
OF EDWARD I. RADIL, APPELLEE.
660 N.W.2d 881

Filed May 16, 2003. No. S-01-920.

1. **Statutes.** Statutory interpretation presents a question of law.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
3. **Jurisdiction: Appeal and Error.** The question of jurisdiction is a question of law, upon which an appellate court reaches a conclusion independent of the trial court.
4. **Actions: Pleadings: Time.** Pursuant to Neb. Rev. Stat. § 25-217 (Reissue 1995), an action is commenced on the date a petition is filed.
5. **Actions: Service of Process: Time: Dismissal and Nonsuit.** If proper service is not obtained within 6 months of the commencement of an action, the action is dismissed by operation of law.
6. **Actions: Dismissal and Nonsuit.** After an action is dismissed by operation of law, all proceedings conducted by the court subsequent to that date, with the exception of any order finalizing the dismissal, are nullities.
7. **Actions: Abatement, Survival, and Revival.** A pending action which survives a defendant's death must be revived in the manner provided by statute.
8. ____: _____. If a pending action is not revived in the manner provided by statute, such pending action has no force and effect as to any entity in whose name revivor was required.

Appeal from the District Court for Dodge County: F.A. GOSSETT III, Judge. Remanded with directions.

Timothy M. Schulz, of Yost, Schafersman, Lamme, Hillis, Mitchell & Schulz, P.C., L.L.O., for appellant.

Thomas A. Grennan and Thomas E. Morrow, Jr., of Gross & Welch, P.C., for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

HENDRY, C.J.

INTRODUCTION

Appellant, Dan Fox, filed a petition against Edward I. Radil in the district court for Dodge County 8 days before the expiration of the applicable statute of limitations. However, Fox was unable to serve Radil with summons before Radil's death approximately 2 months later. After Radil's death, Fox served

appellee, Bradley Nick, special administrator of Radil's estate, with notice of the lawsuit against Radil. Nick was served prior to the expiration of the 6-month period for service of process permitted by Neb. Rev. Stat. § 25-217 (Reissue 1995). The district court granted summary judgment against Fox on the ground that Fox failed to commence his action within the applicable statute of limitations. Fox appealed. We moved the case to our docket pursuant to our authority to regulate the caseloads of this court and the Nebraska Court of Appeals. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

FACTUAL BACKGROUND

On October 23, 1995, Fox and Radil were involved in an automobile accident. On October 15, 1999, 8 days before the expiration of the statute of limitations, Fox filed a petition against Radil in the district court for Dodge County alleging that Radil's negligence had caused the accident and that Fox had suffered injuries as a result.

Fox's attempts to serve Radil with notice of the suit were unsuccessful. A summons sent by certified mail to Radil's last known address was returned unclaimed on November 5, 1999. A November 8 alias summons issued for personal service on Radil was also returned unsatisfied. Radil died on December 18. It is undisputed that Radil was not served with notice of the suit before his death.

On March 29, 2000, Fox filed a "Petition for Appointment of Special Administrator in Formal Proceedings" in the county court for Douglas County. By order issued that same day, the county court appointed Nick as special administrator of Radil's estate in order "to accept service of process in the case of Dan Fox v. Edward I. Radil, District Court of Dodge County, Nebraska." Also on March 29, "Letters of Special Administrator" were issued by the county court "as evidence of such appointment" of Nick as special administrator.

Nick was personally served with summons and petition on April 4, 2000, 11 days before the expiration of the 6-month period for service of process permitted by § 25-217. The summons and petition with which Nick was served, however, named Radil as defendant, rather than Nick in his capacity as special administrator.

On May 4, 2000, Nick filed a special appearance, claiming no suit had been filed against him in his capacity as special administrator. Nick further claimed that he had not been named a party to any pending suit in his capacity as special administrator. For these reasons, Nick asserted the court lacked personal jurisdiction.

On January 5, 2001, Fox filed a "Motion to Amend Petition" in the Dodge County District Court. On February 12, Fox filed an amended petition in the district court, for the first time naming Nick as defendant in his capacity as special administrator of Radil's estate. The record discloses, however, that no order reviving the action in the name of Nick as special administrator has ever been entered by the district court.

On February 23, 2001, Nick filed an answer to Fox's amended petition, in which he preserved his special appearance. On June 28, Nick moved for summary judgment. The district court granted summary judgment, determining Fox's claim was time barred because it was not commenced within the applicable statute of limitations. Fox appeals.

ASSIGNMENTS OF ERROR

Fox assigns, rephrased, that the district court erred in (1) determining no genuine issue of material fact existed, (2) determining Fox's suit was time barred, (3) failing to determine Nick was served "with the lawsuit" in a timely manner, (4) failing to determine that the relation-back doctrine rendered Fox's suit timely, and (5) failing to determine that the liability insurance exception under Neb. Rev. Stat. § 30-2485(c)(2) (Reissue 1995) allowed Fox to proceed with his lawsuit.

STANDARD OF REVIEW

[1,2] Statutory interpretation presents a question of law. *Maxwell v. Montey*, ante p. 335, 656 N.W.2d 617 (2003); *Eyl v. Ciba-Geigy Corp.*, 264 Neb. 582, 650 N.W.2d 744 (2002). When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Maxwell*, supra; *Alegent Health v. American Family Ins.*, ante p. 312, 656 N.W.2d 906 (2003).

[3] The question of jurisdiction is a question of law, upon which an appellate court reaches a conclusion independent of

the trial court. *Kovar v. Habrock*, 261 Neb. 337, 622 N.W.2d 688 (2001).

ANALYSIS

[4-6] In granting Nick's motion for summary judgment, the district court determined Fox's action had not been commenced within the applicable statute of limitations. The issue, however, is whether the district court had jurisdiction when it ruled on Nick's motion. That issue is dependent upon the question of whether Fox obtained proper service within 6 months of commencing his action. Fox's action was commenced on October 15, 1999, the date he filed his petition. See § 25-217 (amended by 2002 Neb. Laws, L.B. 876, substituting "complaint" for "petition"; operative January 1, 2003); *Becker v. Hobbs*, 256 Neb. 432, 590 N.W.2d 360 (1999); *Licht v. Association Servs., Inc.*, 236 Neb. 616, 463 N.W.2d 566 (1990). See, also, Neb. Rev. Stat. § 25-501 (Reissue 1995). If proper service was not obtained on or before April 15, 2000, 6 months after Fox's action was commenced, Fox's action was dismissed by operation of law and any proceeding conducted by the court subsequent to that date, with the exception of any order formalizing the dismissal, was a nullity. See, § 25-217; *Kovar, supra*; *Vopalka v. Abraham*, 260 Neb. 737, 619 N.W.2d 594 (2000). Therefore, since it is undisputed that Fox failed to serve Radil before Radil died, we turn to the question of whether Fox obtained proper service within 6 months from the date his action was commenced.

In *Rhein v. Caterpillar Tractor Co.*, 210 Neb. 321, 324, 314 N.W.2d 19, 21-22 (1982), we observed:

Both at common law and in this jurisdiction prior to 1867, a cause of action for injuries to the person did not survive on the death of either the person injured or the wrongdoer, and a pending action for such an injury abated on the death of either the plaintiff or the defendant. See, 1 C.J.S. *Abatement and Revival* § 144 (1936); *Wilson v. Bumstead*, 12 Neb. 1, 10 N.W. 411 (1881); *Warren v. Englehart*, 13 Neb. 283, 13 N.W. 401 (1882); *Swift v. Sarpy County*, 102 Neb. 378, 167 N.W. 458 (1918); *Gengo v. Mardis*, 103 Neb. 164, 170 N.W. 841 (1919); *Hindmarsh v. Sulpho Saline*

Bath Co., 108 Neb. 168, 187 N.W. 806 (1922); *Egbert v. Wenzl*, 199 Neb. 573, 260 N.W.2d 480 (1977).

It was only by reason of the enactment of the survivorship statutes, Neb. Rev. Stat. §§ 25-1401 and 25-1402 (Reissue 1979), in 1867 . . . that the common-law rule was, in any manner, changed, and *then only to the limited extent provided by statute*.

(Emphasis supplied.) See, also, *Babbitt v. Hronik*, 261 Neb. 513, 623 N.W.2d 700 (2001). Specifically, Neb. Rev. Stat. § 25-1402 (Reissue 1995) provides that “[n]o action pending in any court shall abate by the death of either or both the parties thereto, except an action for libel, slander, malicious prosecution, assault, or assault and battery, or for a nuisance, which shall abate by the death of the defendant.” Fox’s action was “pending” in the Dodge County District Court, even though efforts to serve Radil prior to his death were unsuccessful.

We recognize that in *Willis v. Rose*, 223 Neb. 49, 388 N.W.2d 101 (1986), this court concluded that an action is “pending” for purposes of § 25-1402 if, prior to the defendant’s death, both a petition is filed and the defendant is properly served. However, at the time *Willis* was decided, § 25-217 provided in relevant part that an action “shall be deemed commenced” on the date the petition is filed with the court “*if* proper service is obtained within six months of such filing.” (Emphasis supplied.) § 25-217 (Reissue 1985).

Since our decision in *Willis*, § 25-217 has been amended. At all times relevant to this case, § 25-217 read: “An action is commenced on the date the petition is filed with the court. The action shall stand dismissed without prejudice as to any defendant not served within six months from the date the petition was filed.” See 1986 Neb. Laws, L.B. 529. The amendment to § 25-217 no longer requires that service be “obtained” before an action “shall be deemed commenced.” In addition, the plain language of § 25-217 requires such determination, for as to any defendant not served within 6 months of filing, the action stands dismissed without prejudice. Clearly, if an action is not commenced upon filing, there would be no need to dismiss the action as to “any defendant not served within six months.” Since Fox’s action had commenced prior to the date

of Radil's death, we determine Fox's action was pending in accordance with § 25-1402. See *Kovar v. Habrock*, 261 Neb. 337, 342, 622 N.W.2d 688, 692 (2001) (providing that when action is dismissed by operation of law due to failure to effect proper service within 6 months, "there is no longer an action pending"). Accordingly, pursuant to § 25-1402, Fox's pending action for damages based on the alleged negligence of Radil did not abate as a result of Radil's death. See *Levin v. Muser*, 107 Neb. 230, 185 N.W. 431 (1921).

[7] Although the enactment of § 25-1402 changed the common law pertaining to the abatement of pending actions, as we observed in *Rhein v. Caterpillar Tractor Co.*, 210 Neb. 321, 324, 314 N.W.2d 19, 22 (1982), such changes are "only to the limited extent provided by statute." To that effect, a pending action which survives the defendant's death must be revived in the manner provided by statute. *Workman v. Workman*, 167 Neb. 857, 872, 95 N.W.2d 186, 195 (1959) (stating that "[p]rocedure for revivor is provided by statute upon the death of a litigant in a cause pending in his lifetime if the cause of action did not abate upon his death"); *Murray v. Omaha Transfer Co.*, 95 Neb. 175, 179, 145 N.W. 360, 362 (1914) (stating that "[t]he action not having abated, the statutes make provision for revivor"). See, also, *Vogt v. Daily*, 70 Neb. 812, 813, 98 N.W. 31, 32 (1904) (stating "[m]anifestly, if before judgment a party plaintiff die, the action can no longer proceed in his name, but must be revived in the name of his representative or successor"); *A.J. Armstrong Company v. Hufstedler*, 75 N.M. 408, 410, 405 P.2d 411, 412 (1965) (stating that "[i]t is fundamental that a pending action cannot be prosecuted after the death of a party defendant thereto, so as to affect the decedent's estate, until it is revived against his personal representative or successor in interest").

As observed in 1 C.J.S. *Abatement and Revival* § 155 at 211-12 (1985):

The substitution of a new party to proceed with the prosecution or defense of a claim is the revivor of an action. The death of a party to a legal proceeding, where the cause of action survives, suspends the action as to decedent until someone is substituted for decedent as a party.

The right to revive or continue a pending action at law after the death of a party is purely statutory; there may be a revival or continuance when and only when the case is within a statute permitting it, and strict compliance with the statutory requirements is shown.

[8] If a pending action is not revived in the manner provided by statute, “such pending action has no force and effect” as to any entity in whose name revivor was required. *Smith v. Ralph*, 18 Ohio App. 2d 235, 238, 248 N.E.2d 208, 210 (1969); *A.J. Armstrong Company v. Hufstedler*, 75 N.M. at 410, 405 P.2d 412 (noting that “[s]ince the revival of actions at law is purely statutory, they may be revived only as prescribed by [a New Mexico statute]” nearly identical to Neb. Rev. Stat. § 25-1411 (Reissue 1995)). See, also, Neb. Rev. Stat. § 30-2404 (Reissue 1995) (“no proceeding to enforce a claim against the estate of a decedent . . . may be revived . . . before the appointment of a personal representative”).

Nebraska’s statutory procedure for revivor is provided by Neb. Rev. Stat. §§ 25-1403 to 25-1420 (Reissue 1995) and Neb. Rev. Stat. § 25-322 (Reissue 1995). Specifically, § 25-1411 provides:

Upon the death of a defendant in an action, wherein the right, or any part thereof, survives against his personal representative, the revivor shall be against him; and it may also be against the heirs or devisees of the defendant, or both, when the right of action, or any part thereof, survives against them.

Although the record shows that Nick was appointed “special administrator” by the county court for Douglas County on March 29, 2000, the record is devoid of any evidence showing that after such appointment, the pending action was revived in the name of Nick as special administrator. See Neb. Rev. Stat. § 30-2209(33) and (43) (Cum. Supp. 2002) (“[p]ersonal representative includes . . . special administrator” and “[s]pecial administrator means a personal representative as described in sections 30-2457 to 30-2461”).

There is no motion “suggesting” the death of Radil per § 25-1407, no conditional order of revivor per § 25-1406, and nothing to suggest any revivor based upon the consent of the parties per § 25-1408. Finally, although we have construed § 25-322

to permit revivor if, with leave of the court, “‘supplemental pleadings [are] filed and summons served as in the commencement of an action,’” *Hayden v. Huff*, 62 Neb. 375, 379, 87 N.W. 184, 186 (1901), Fox did not file an amended petition naming Nick as defendant in his capacity as special administrator until February 12, 2001. This was nearly 10 months after April 15, 2000, the date upon which the 6-month deadline for service of process under § 25-217 expired.

After Radil’s death, it became necessary to revive the pending action against Radil’s “personal representative” and obtain service on that individual. Although Nick was appointed “special administrator” by the Douglas County Court on March 29, 2000, both the summons and petition served upon Nick on April 4 identified Radil as defendant in the pending action. In essence, Nick was served with summons in a pending lawsuit that had not been revived to include him as a named defendant. Such service was a nullity.

The record shows that no service was obtained upon any proper party defendant within 6 months from the date the action was filed. As such, the action stood dismissed without prejudice as a matter of law on April 15, 2000. See, § 25-217; *Kovar v. Habrock*, 261 Neb. 337, 622 N.W.2d 688 (2001); *Vopalka v. Abraham*, 260 Neb. 737, 619 N.W.2d 594 (2000). As a result, any action taken by the district court subsequent to April 15 and any pleading filed thereafter was a nullity, as the district court lacked jurisdiction. *Id.*

Given our determination that this action was dismissed without prejudice on April 15, 2000, we need not address Fox’s remaining assignments of error.

CONCLUSION

We remand the cause to the district court with directions to vacate the order of summary judgment in favor of Nick and to enter an order that Fox’s petition stands dismissed pursuant to § 25-217.

REMANDED WITH DIRECTIONS.

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